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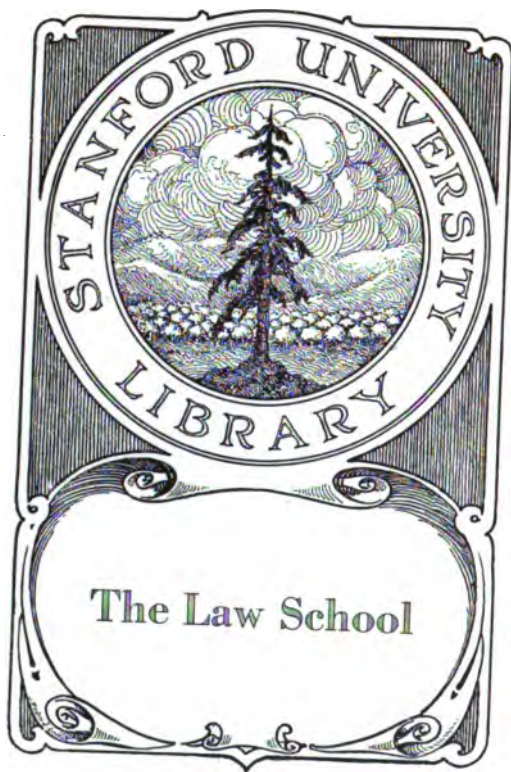
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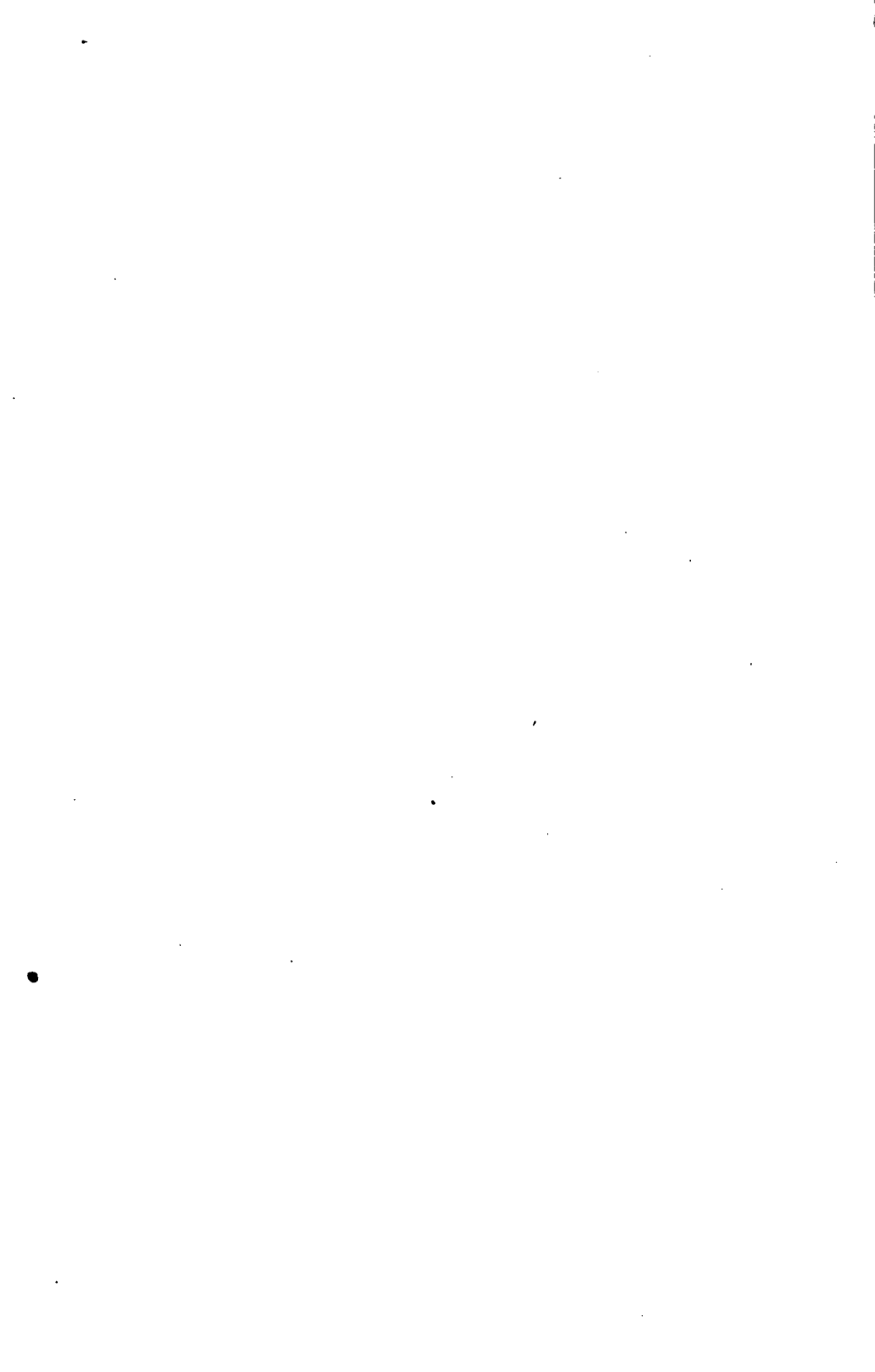
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Leading Cases

on

International Law

By LAWRENCE B. EVANS, Ph. D.

**Counsel to the Brazilian Embassy, Washington
Special Counsel to the United States Shipping Board**

Second Edition

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УВАЖАЈТЕ ОБОЈА

With law shall our land be built up
and settled, and with lawlessness wasted
and spoiled.

—*The Story of Burnt Njal.*

What we seek is the reign of law based
upon the consent of the governed and
sustained by the organized opinion of
mankind.

—*Woodrow Wilson.*

It is impossible that the human mind
should be addressed to questions better
worth its noblest efforts, offering a greater
opportunity for usefulness in the exercise
of its powers, or more full of historical
and contemporary interest, than in the
field of international rights and duties.

—*Elihu Root.*



PREFACE TO THE SECOND EDITION

In acceding to the request of my publishers to prepare a new and enlarged edition of my collection of cases on international law, I have utilized the opportunity to introduce some topics which were not included in the first edition as well as to treat the several subjects with greater fulness than was there possible. While all the cases which make up the body of the collection are taken from English-speaking jurisdictions, they represent considerable variety in point of view since they include decisions from the highest courts of Massachusetts, New York and New Jersey, the several inferior Federal courts, the Court of Claims and the Supreme Court of the United States, while the far-flung empire of our British kinsmen is represented by decisions of the Judicial Committee of the Privy Council, the House of Lords, the High Court of Justice, the High Court of Admiralty, the High Court of Justiciary and the Court of Session of Scotland, as well as by the decisions of courts sitting in Egypt, South Africa and Hong-Kong. All the cases, 102 in number, which were in the first edition have been retained, and 46 have been added. The present collection therefore comprises 148 cases, of which 83 were decided in British courts and 65 in American courts. The slight preponderance of British cases is largely accounted for by the great number of decisions made by British courts on questions of prize law during the Great War.

In making a collection of cases on international law, especially so soon after a conflict in which one's own country was engaged, the temptation is strong to emphasize the controversies which arose in the midst of the conflict and to give undue weight to the law of war. This temptation is all the greater when one has at his disposition the opinions of such judges as Sir Samuel Evans, who was President of the British Prize Court from the beginning of the Great War until his death September 13, 1918, of Lord Parker of Waddington, Lord Finlay and Lord Sumner. I have tried to bear in mind however that the normal relation

of nations is one of peace, and that it is the law of pacific intercourse rather than of war which should chiefly hold our interest. This is all the more true since the establishment by the League of Nations of a court for the settlement of international controversies by the application of rules of law rather than by those compromises which from a juristic standpoint make arbitral tribunals so disappointing.

In the editing of the cases, I have abbreviated some of the longer ones by the omission of matter not essential to the discussion of the subjects on which they were cited. In every instance, however, the facts out of which the controversy arose are given, as well as a sufficient portion of the opinion to show the line of reasoning by which the court reached its conclusion. Except for omissions and paraphrases which are indicated in the usual way, the texts have been reproduced *verbatim et literatim*. The notes have been much extended. While the cases cited are about 1200 in number and have been drawn not only from British and American jurisdictions but also from those of France, Germany, Holland, Italy, Brazil and Japan, and while references to the writings of scholars of authority comprise some 350 titles, neither list is intended to be exhaustive. I have assumed that such classic commentaries as those of Wheaton, Phillimore and Hall as well as the many systematic treatises which have appeared more recently are sufficiently familiar and I have referred to them only when there was some special reason for doing so. Hence the writings cited in the notes are for the most part monographs or articles in periodicals. A few exceptions may be noted. On almost all topics reference has been made to the seventh edition of Bonfils' *Manuel de Droit International Public*, prepared by Paul Fauchille, which well represents the Continental point of view; to Hyde's *International Law Chiefly as Interpreted and Applied by the United States*, which as a presentation of the isolated American point of view is all that could be desired; and to Professor John Bassett Moore's monumental *Digest of International Law*,—a work with which no student can be too well acquainted. For further bibliographies reference may be made to the excellent lists in Fauchille's edition of Bonfils and in Hershey, *The Essentials of International Public Law*. The latter is the more discriminating.

It is a pleasure to acknowledge the assistance which I have received in the preparation of this edition from Professor E. M.

Borchard of the Yale Law School and Professor Jesse S. Reeves of the University of Michigan, and from my good friend and chief, His Excellency, Augusto Cochrane de Alencar, Ambassador of Brazil to the United States, who has given me the benefit of his exceptionally wide and varied diplomatic experience and has instructed me on many points as to the practice of nations in the conduct of international relations. To those who use this book, I commend again the caution of Littleton: "And know, my son, that I would not have thee believe that all that I have said in these books is law, for I will not presume to take this upon me. But of those things which are not law, inquire and learn of my wise masters learned in the law."

LAWRENCE B. EVANS.

1520 H Street, N. W.,
Washington, September 7, 1922.



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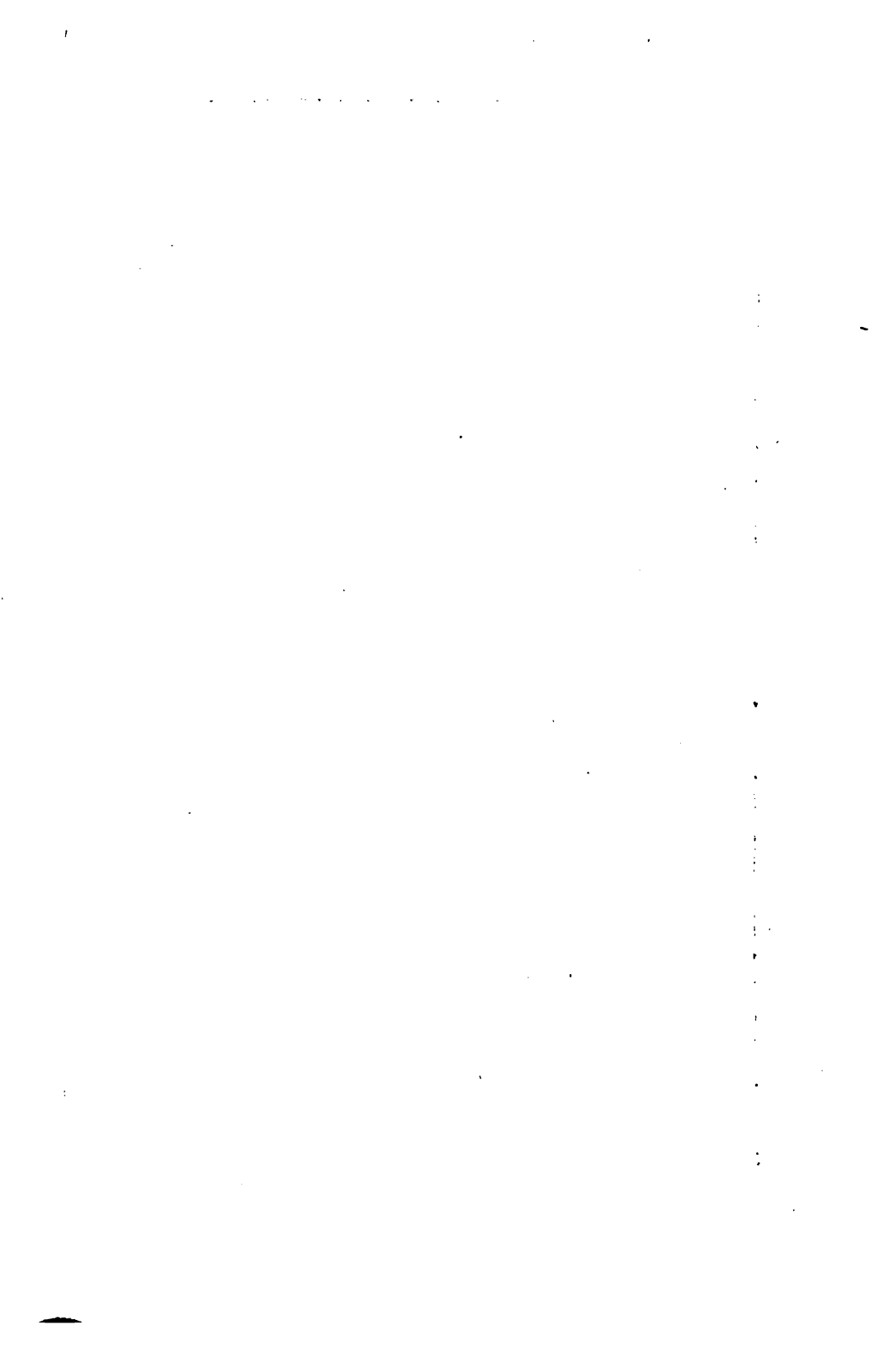
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Leading Cases on International Law

CHAPTER I.

THE NATURE AND AUTHORITY OF INTERNATIONAL LAW.

SECTION 1. THE NATURE AND SOURCES OF INTERNATIONAL LAW.

UNITED STATES v. THE SCHOONER LA JEUNE EUGENIE.

CIRCUIT COURT OF THE UNITED STATES. 1822.
2 Mason, 409.

STORY, J. This is a libel brought against the schooner La Jeune Eugenie, which was seized by Lieut. Stockton, on the coast of Africa, for being employed in the slave trade. The allegation asserts the offense in two forms; first, as against the slave trade acts of the United States; and secondly, as against the general law of nations. A claim has been given in by the French consul, in behalf of the Claimants, who are subjects of France, resident in Basseterre, in the island of Guadaloupe, as owners of the schooner; and there is also a Protest filed by the French consul against the jurisdiction of the court, upon the ground, that this is a French vessel, owned by French subjects, and as such, exclusively liable to the jurisdiction of the French tribunals, if she shall turn out, upon the evidence, to have been engaged in this dishonorable traffic. . . . It is contended on behalf of

the plaintiffs, that this court has a right to entertain jurisdiction, and is bound to reject the claim of the defendants; First, because the African Slave Trade is repugnant to the law of nations; Secondly, because it is prohibited by the municipal laws of France. On the other side it is contended, that the trade is not repugnant to the law of nations; and if prohibited by the laws of France, it is a municipal regulation, which the tribunals of France are alone competent to inquire into and punish.

I shall take up no time in the examination of the history of slavery, or of the question, how far it is consistent with the natural rights of mankind. That it may have a lawful existence, at least by way of punishment for crimes, will not be doubted by any persons, who admit the general rights of society to enforce the observance of its laws by adequate penalties. . . . That it has interwoven itself into the municipal institutions of some countries, and forms the foundation of large masses of property in a portion of our own country, is known to all of us. . . . It would be unbecoming in me here to assert, that the state of slavery cannot have a legitimate existence, or that it stands condemned by the unequivocal testimony of the law of nations.

But this concession carries us but a very short distance towards the decision of this cause. It is not, as the learned counsel for the government have justly stated, on account of the simple fact, that the traffic necessarily involves the enslavement of human beings, that it stands reprehended by the present sense of nations; but that it necessarily carries with it a breach of all the moral duties, of all the maxims of justice, mercy and humanity, and of the admitted rights, which independent christian nations now hold sacred in their intercourse with each other. . . . It is of this traffic in the aggregate of its accumulated wrongs, that I would ask, if it be consistent with the law of nations? It is not by breaking up the elements of the case into fragments, and detaching them one from another, that we are to be asked of each separately, if the law of nations prohibits it. We are not to be told, that war is lawful, and slavery lawful, and plunder lawful, and the taking away of life is lawful, and the selling of human beings is lawful. Assuming that they are so under circumstances, it establishes nothing. It does not advance one jot to the support of the proposition, that a traffic, that involves them all, that is unnecessary, unjust, and inhuman,

is countenanced by the eternal law of nature, on which rests the law of nations.

Now the law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states. What, therefore, the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. Nor is it to be admitted, that no principle belongs to the law of nations, which is not universally recognized, as such, by all civilized communities, or even by those constituting, what may be called, the christian states of Europe. Some doctrines, which we, as well as Great Britain, admit to belong to the law of nations, are of but recent origin and application, and have not, as yet, received any public or general sanction in other nations; and yet they are founded in such a just view of the duties and rights of nations, belligerent and neutral, that we have not hesitated to enforce them by the penalty of confiscation. There are other doctrines, again, which have met the decided hostility of some of the European states, enlightened as well as powerful, such as the right of search, and the rule, that free ships do not make free goods, which, nevertheless, both Great Britain and the United States maintain, and in my judgment with unanswerable arguments, as settled rules in the Law of Prize, and scruple not to apply them to the ships of all other nations. And yet, if the general custom of nations in modern times, or even in the present age, recognized an opposite doctrine, it could not, perhaps, be affirmed, that that practice did not constitute a part, or, at least, a modification, of the law of nations.

But I think it may be unequivocally affirmed, that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations, which

may be evidenced by their general practice and customs, it may be enforced by a court of justice, whenever it arises in judgment. And I may go farther and say, that no practice whatsoever can obliterate the fundamental distinction between right and wrong, and that every nation is at liberty to apply to another the correct principle, whenever both nations by their public acts recede from such practice, and admit the injustice or cruelty of it.

Now in respect to the African slave trade, such as it has been described to be, and in fact is, in its origin, progress, and consummation, it cannot admit of serious question, that it is founded in a violation of some of the first principles, which ought to govern nations. It is repugnant to the great principles of christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice. When any trade can be truly said to have these ingredients, it is impossible that it can be consistent with any system of law, that purports to rest on the authority of reason or revelation. And it is sufficient to stamp any trade as interdicted by public law, when it can be justly affirmed, that it is repugnant to the general principles of justice and humanity.

Now there is scarcely a single maritime nation of Europe, that has not in the most significant terms, in the most deliberate and solemn conferences, acts, or treaties, acknowledged the injustice and inhumanity of this trade; and pledged itself to promote its abolition. . . . Our own country, too, has firmly and earnestly pressed forward in the same career. . . . At the present moment the traffic is vindicated by no nation, and is admitted by almost all commercial nations as incurably unjust and inhuman. It appears to me, therefore, that in an American court of judicature, I am bound to consider the trade an offense against the universal law of society, and in all cases where it is not protected by a foreign government, to deal with it as an offense carrying with it the penalty of confiscation. . . .

There is an objection urged against the doctrine, which is here asserted, that ought not to be passed over in silence; and that is, if the African slave trade is repugnant to the law of nations, no nation can rightfully permit its subjects to carry it on, or exempt them from obedience to that law; for it is said, that no nation can privilege itself to commit a crime against the law of nations by a mere municipal regulation of its own. In a sense the proposition is true, but not universally so. No nation has a right to infringe the law of nations, so as thereby to produce an

injury to any other nation. But if it does, this is understood to be an injury, not against all nations, which all are bound or permitted to redress; but which concerns alone the nation injured. The independence of nations guarantees to each the right of guarding its own honour, and the morals and interests of its own subjects. No one has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns. If a nation were to violate as to its own subjects in its domestic regulation the clearest principles of public law, I do not know, that that law has ever held them amenable to the tribunals of other nations for such conduct. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. No nation has ever yet pretended to be the *custos morum* of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy. . . .

I have come to the conclusion, that the slave trade is a trade prohibited by universal law, and by the law of France, and that, therefore, the claim of the asserted French owners must be rejected. That claim being rejected, I feel myself at perfect liberty, with the express consent of our own government, to decree, that the property be delivered over to the consular agent of the King of France, to be dealt with according to his own sense of duty and right. . . .

THE SCOTIA.

SUPREME COURT OF THE UNITED STATES. 1872.
14 Wallace, 170.

Appeal from the Circuit Court for the Southern District of New York.

[In 1863 the British government adopted a series of regulations for preventing collisions at sea. In 1864 the American Congress adopted practically the same regulations. Within a short time the governments of almost all maritime countries indicated their willingness that the British regulations should apply to their ships when outside British jurisdiction. In this state

of the law, the *Scotia*, a British steamer, collided in mid-ocean with the *Berkshire*, an American sailing ship, and the latter was sunk. The owners of the *Berkshire* filed their libel in the United States District Court in New York, alleging that the collision occurred through the fault of the *Scotia*, and arguing that the respective rights and duties of the two vessels were determined by the general maritime law as it existed before the British legislation of 1863 which had been adopted by practically all maritime nations. The District Court dismissed the libel, and the Circuit Court having affirmed that decree an appeal was taken to this court.]

Mr. Justice STRONG delivered the opinion of the court. . . .

It must be conceded, however, that the rights and merits of a case may be governed by a different law from that which controls a court in which a remedy may be sought. The question still remains, what was the law of the place where the collision occurred, and at the time when it occurred. Conceding that it was not the law of the United States, nor that of Great Britain, nor the concurrent regulations of the two governments, but that it was the law of the sea, was it the ancient maritime law, that which existed before the commercial nations of the world adopted the regulations of 1863 and 1864, or the law changed after those regulations were adopted? Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the earliest system of marine rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The

same may be said of the Amalphitan table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of January 9th, 1863, and in our act of Congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libellants complain took place.

This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that, by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.

The consequences of this ruling are decisive of the case before us. The violation of maritime law by the Berkshire in carrying a white light (to say nothing of her neglect to carry colored lights), and her carrying it on deck instead of at her masthead, were false representations to the Scotia. They proclaimed that the Berkshire was a steamer, and such she was manifestly taken to be. The movements of the Scotia were therefore entirely proper, and she was without fault.

Decree affirmed, with costs.

FRANCIS DAINESE v. THE UNITED STATES.

COURT OF CLAIMS OF THE UNITED STATES. 1880.
15 Ct. Cl. 64.

[The claimant, an Austrian subject domiciled in Turkey, was appointed by the American consul at Constantinople to act as vice-consul. The American Legation in Constantinople recognized him as such and the Department of State transacted business with him in that capacity. He now sues to recover pay for the judicial duties which he performed as a consular officer and which were imposed upon him by the treaty of May 7, 1830 between the United States and the Ottoman Porte.]

DAVIS, J., delivered the opinion of the court:

This is an action to recover salary. The claimant contends that he was a duly appointed consular officer of the United States, although not a citizen thereof at the period sued for, and that by reason of having had judicial duties imposed upon him he became entitled to the extra pay allowed by the Act August 14, 1848 (9 Stat. L., 276), to certain consuls performing such duties. . . .

The Attorney-General . . . calls attention to a difference between the United States and the Ottoman Porte as to the construction of the treaty of 1830, which he contends is a question for the political department of the government. He maintains that it is necessarily involved in the exercise of jurisdiction in this case, and that, therefore, we should stop at the threshold.

The fourth article of that treaty, as printed in the Statutes at Large, provides that when American citizens within the dominions of the Ottoman Porte may have committed some offense they shall not be arrested and put in prison by the local authorities, but they shall be tried by their minister or consul and punished according to their offense, following, in this respect, the usages towards other Franks. (8 Stat. L., 409.) The Turkish Government denies the authenticity of the English text, and claims that the terms of the original Turkish text, which, they say, was accepted by the American negotiator to be strictly observed on all occasions, does not affect the rights of the Turkish Government with respect to the preventive arrest and holding in custody of foreign subjects during criminal proceedings of which they may be the objects, and that it accords to Americans

the same privilege which the subjects of other powers already enjoyed, viz, as they say, the leaving to the minister or consul the execution of the punishments to which Americans may be condemned in case of crimes or offenses. (United States Consular Regulations, ed. 1870, pp. 192, 193.)

The "usages of the Franks" begin in what are known in international law as "the capitulations," granting rights of extraterritoriality to Christians residing or traveling in Mohammedan countries. Some ingenious writers attempt to trace these capitulations far back of the capture of Constantinople in 1453 by the Turks. (1 Féraud-Giraud, *Juridiction Française dans les Échelles*, 29 et seq.) They are undoubtedly rooted in the radical distinction between Mohammedanism, which acknowledges the Koran as the only source of human legislation and the only law for the government of human affairs, and the western systems of jurisprudence, which are animated by the equitable and philosophical principles of Roman law and Christian civilization. But their accepted foundation in international law is in the treaty made with the French in 1535, which guaranteed that French consuls and ministers might hear and determine civil and criminal causes between Frenchmen without the interference of a Cadi or any other person. (1 De Testa, 16.) After this treaty the French took under their protection persons of other nationalities not represented by consuls (2 Féraud-Giraud, 76), and hence the generic name of "Franks" was given to all participants in the privileges, and has been preserved in the laws, treaties, and public documents of the United States. (8 Stat. L., 409; 12 Stat. L., 76, § 21; 7 Op. Attys. Gen., 568.)

Other nations followed the examples thus set by the French, as, for instance, the English in 1675 (Brit. & For. St. Pap., 1812-'14, Part I, 750); the Two Sicilies in 1740 (1 Wenekius, 522); Spain in 1782 (3 Martin's Rec., 2d ed., 405); and the United States in 1830 (8 Stat. L., 408). All writers agree that by these and other similar capitulations a usage was established that Franks, being in Turkey, whether domiciled or temporarily, should be under the jurisdiction, civil and criminal, of their respective ministers and consuls. This usage, springing thus not only out of the capitulations, but out of the "very nature of Mohammedanism" (3 Phil., preface, iv), became a part of the international law of Europe. . . .

In the case of *Triquet v. Bath* (3 Burrows, 1478), which was argued by Blackstone, Thurlow, and Dunning, and decided in

1764 by the King's Bench, Lord Mansfield giving the opinion, it was held to be beyond doubt that the law of nations is part of the common law of England; and that it is to be collected from the practice of different nations and from the authority of writers. Blackstone incorporated this doctrine into his commentaries (Bl. Com., Book 4, ch. 5), which were first published soon after the decision was rendered. (See also *Novello v. Toogood*, 1 B. & C., 562.)

That the law of nations forms part of our inheritance is a familiar doctrine, recognized by the highest tribunal. (30 *Hoga Sugar v. Boyle*, 9 Cranch, 191.) The political department of the government has also uniformly insisted that persons under the protection of the United States shall enjoy in foreign lands all the rights, privileges, and immunities to which the law of nations entitles any foreigner. (*Martin Kosta's Case* and many others.) Attorney-General Cushing, applying this doctrine, held it to be undoubted that all Franks were absolutely exempted, in controversies among themselves, from the local jurisdiction of the Porte (7 Op. Attys. Gen., 568), and the Supreme Court has recognized the general doctrine that consuls in Mohammedan countries are clothed with judicial powers, as part of the public law of the United States. (*Mahoney v. The United States*, 10 Wall., 66.) . . .

In view of all this, while we refrain from considering which text of the treaty of 1830 is valid in our international relations, or what is the true construction of either text, we can have no doubt that, at the time of the claimant's alleged service, a consular office in Turkey was regarded as calling for the possible exercise of judicial functions. This may have been an element in influencing appointments, and a motive in inducing the acceptance of office. When a treaty, after acceptance by the Senate and exchange of ratifications, is promulgated in a given text which, so far as it relates to a general principle of public law, is in harmony with the opinion of all publicists, and the legislature creates an office for the performance of quasi-international duties under that treaty and attaches a salary to it, and the President duly fills the office, and the incumbent takes possession of it, the latter is entitled to the salary, irrespective of any diplomatic question as to the construction or validity of the treaty. . . .

[The court found that the claimant had not been duly invested with the office of vice-consul.]

IN THE MATTER OF AN ARBITRATION BETWEEN THE
OSAKA SHOSEN KAISHA AND THE OWNERS
OF THE STEAMSHIP PROMETHEUS.SUPREME COURT OF HONG-KONG. 1906.
2 Hong-Kong Law Reports, 217.

[On February 10, 1904, the Osaka Shosen Kaisha, a Japanese steamship company, and the agents of the owners of the Norwegian steamship Prometheus signed a charter-party at Hong-Kong by which the steamship Prometheus was chartered to the Japanese company for six months. By clause 37 of the contract it was expressly agreed that "in case of war steamer not to be directed to any blockaded port nor to carry any contraband of war." When the charter-party was signed, hostilities had already broken out between Russia and Japan, but this was not known to the signers of the contract, which however was made in anticipation of war. On February 14, the government of Russia published the list of articles which it declared to be contraband, which list concluded with the words, "In general, all articles intended for war, on sea or land, such as rice, provisions, horses, beasts of burden and others which can be of use in war, if they are carried for an enemy or to an enemy destination." While the Prometheus was at Kobe loading with a cargo for Formosa, the owners telegraphed the master of the vessel to "decline rice and provisions between Japanese ports." In consequence of the refusal of the master to accept the cargo of rice, sugar and provisions, on the ground that they were contraband within the meaning of clause 37 of the charter-party, the steamship could not be used in the trade for which it was hired, and the Osaka Shosen Kaisha brought an action for breach of contract. The arbitrator who found the facts submitted to the court several questions, the first of which was, whether the cargo offered for shipment at Kobe was contraband within the meaning of the Russian declaration, and if so, whether that declaration is binding upon neutrals.]

THE CHIEF JUSTICE [SIR HENRY BERKELEY]: . . .

What then is the meaning of the expression "contraband of war" in its primary sense? Mr. Wharton, in his "Law Lexicon," defines contraband of war as meaning in its primary sense that which according to international law cannot be sup-

plied to a hostile belligerent except at the risk of seizure and condemnation by the aggrieved belligerent. That seems to me a sound definition if you understand the word "risk" to mean that risk which is contemplated and recognized by the law of nations. Broadly stated then "contraband of war" is that which is so considered by the law of nations. The question which naturally follows is "What do you mean by the law of nations?" I answer that the law of nations is that system of rules respecting belligerent and neutral rights established by consent among the civilized and commercial nations of the world, partly written and partly arising out of custom and rendered stable by judicial decisions from time to time.

In my opinion, the expression contraband of war has a well-known and accepted meaning among the civilized commercial powers of the world. If that were not so we should not, as we do, find the expression used without definition in solemn treaties between the powers. The expression "contraband of war" is used without any definition of its meaning in the Treaty of Paris of the 16th April, 1856. The inference from that fact is, to my mind, irresistible that there was no definition needed, because the expression had the same definite meaning in the minds of all the plenipotentiaries of the Powers parties to that treaty.

The Treaty of Paris, to which Russia is a party, and to which she still adheres, commences with the following preamble: . . . Then immediately follows this declaration:—"The above-mentioned plenipotentiaries being duly authorised resolved to concert among themselves as to the means of attaining this object; and having come to an agreement have adopted the following solemn Declaration:—

"(1) Privateering is, and remains abolished.

"(2) The neutral flag covers enemy's goods, with the exception of contraband of war.

"(3) Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

"(4) Blockades in order to be binding, must be effective, that is to say maintained by a force sufficient really to prevent access to the coast of the enemy."

I draw special attention to the fact that the expression "contraband of war" is twice used in this declaration without being in any way defined. This declaration was designed to give effect to the opinion of the plenipotentiaries expressed in the pre-

amble, viz. that it was to the advantage of the civilised world to establish a uniform doctrine on the subject of maritime law in time of war; and with that object in view to introduce certain "fixed principles." At the same sitting of the plenipotentiaries the following resolution was adopted (Protocol No. 24): "On the proposition of Count Walewski, and recognising that it is for the general interest to maintain the indivisibility of the four principles mentioned in the declaration signed this day, the plenipotentiaries agree that the powers which shall have signed it, or which shall have acceded to it, cannot hereafter enter into any arrangement in regard to the application of the right of neutrals in time of war which does not at the same time rest on the four principles which are the object of the said declaration."

It will be observed that by this Protocol the plenipotentiaries of Russia bind that Power not thereafter to adopt any attitude towards neutrals in time of war which does not rest upon the four principles enunciated in the declaration. This Protocol has an important bearing upon the contention at the Bar that Russia as an independent sovereign state possesses, as a concomitant to the right to make war, the right to declare what shall or shall not be considered contraband of war.

I dwell here upon the fact that the expression "contraband of war" occurs twice in the declaration in the Treaty of Paris; that the expressions "privateering" and "blockade" occur each once; and that there is in that declaration no definition of the meaning of any of those expressions. Why was there this omission to define these expressions? Was it not because they each had in the minds of the Plenipotentiaries of the Powers a recognized meaning at the time when the treaty was signed? and because the expression "contraband of war" no more needed definition than the expressions "blockade" or "privateering" did? What then was the meaning which it must fairly be assumed the Plenipotentiaries attached to the expression "contraband of war" as used by them in the Treaty of Paris? It seems to me that the Plenipotentiaries had in their minds the meaning which at the time attached to the expression "contraband of war" resulting from the decisions of the courts of law of the nations of Europe and America; principally indeed the decisions in the English Courts on cases arising during the Napoleonic War. What then is the result of those decisions? What meaning has been thereby attached to the expression "contraband of war"? The result has been to attach to that expression the following twofold mean-

ing:—(1) Absolute contraband of war—which includes everything useful for war only; (2) That which is conditional contraband of war—which includes all things which though useful for both peace and war become contraband if destined for the purposes of war: excluding from the meaning of contraband of war such things as are useful for the purposes of peace only. “Provisions,” consequently, come within the definition of conditional contraband only, if and when destined for the enemy’s forces; otherwise they are excluded from the definition. That is, in my opinion, the true meaning to be attached to the expression “contraband of war,” and that is the sense which, in my opinion, that expression bears on a true construction of the Declaration of the Plenipotentiaries who signed the Treaty of Paris of 1856. That is, in my opinion, the sense in which the parties to the charter of the ship *Prometheus* must be taken to have understood the expression “contraband of war” when they agreed by Clause 37, that the ship *Prometheus* was not to “carry any contraband of war.” To construe that expression as meaning whatever might at any time, that is to say from time to time, be declared by Russia to be contraband, as the learned counsel for the owner contended I should, would be to import into the contract between the parties an element of uncertainty where none need exist. The contract was made in Hongkong, and therefore in the absence of evidence to the contrary which I could act upon the parties must be taken to have used the expression “contraband of war” in the sense in which [it] is understood in British courts of law, which is its sense in international law. It cannot be successfully contended that provisions would be regarded by British courts of law as unconditional contraband of war, or that there is any likelihood that they will ever take that view. Had this court been asked at any time between the signing of the charter party on the 10th February, 1904, and the issuing of the Russian declaration to construe the meaning of the words contraband of war it cannot be doubted that it would have excluded provisions from the category of unconditional contraband. It is contended however that the court ought to place a different meaning on that expression, after, and in view of, the terms of the Russian declaration, inasmuch as Russia being a sovereign independent power has a prerogative right to declare whatever she pleases to be contraband of war in any war in which she may be engaged, and that the effect of the Russian declaration having been to

make provisions unconditionally contraband the master of the ship Prometheus was excused from loading them on his ship. In this contention I am unable to concur. In the view which I take of the effect of the Declaration under the Treaty of Paris of 1856, and of the undertaking by the several powers signatory thereto, given in the Protocol No. 24, not to depart from the principles enunciated in the Declaration, I think that Russia was not at liberty to declare provisions unconditional contraband of war; and that her declaration in that respect could not affect the contract between the parties to this charter party, even supposing it could be held that contraband of war means, as used in the charter party, whatever Russia may consider as such: for Russia having been a party to the solemn declaration of "fixed principles" under the Treaty of Paris was not at liberty to disregard those principles and was therefore bound to recognize, and act upon, the generally accepted rule of international law that provisions are not unconditional contraband. In this view I am supported by the decision in the case of *Pollard v. Bell*, 8 T. R. 434, where it was laid down that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances without the concurrence of other nations! Against the view which I hold, viz. that provisions are by the law of nations only conditional contraband, and that they were so regarded by the signatories to the Treaty of Paris, 1856, it was urged that notwithstanding that treaty the French when engaged in hostilities against China in 1885 intended to treat as contraband all shipments of rice destined to the open ports north of Canton. That fact however only amounts to this: that on that occasion France proposed to act in a manner which, had she been called upon to defend, she would have found difficulty in justifying, in the face of the declaration under the Treaty of Paris to which she was a party. Fortunately preliminaries of peace were settled before any seizures were in fact made by the French, and so the intended action of France cannot properly be drawn into a precedent against the principle enunciated in *Pollard v. Bell*. It is moreover to be remarked in connection with this intended action on the part of France in 1885 that her right to make provisions unconditional contraband was at the time denied by Great Britain. In *Pollard v. Bell*, 8 T. R. 434, decided in 1800, a French Prize Court, France then being at war with Great Britain, and Denmark being neutral, condemned a Danish ship on the ground that she was at the

time of capture carrying a Scotchman as supercargo in violation of an ordinance by which it was declared that all ships should be confiscated "wherever there shall be found on board a supercargo, merchant, commissary, or chief officer being an enemy." In dealing with the ground assigned by the French Court condemning the ship Chief Justice Lord Kenyon said "this is one of the numberless questions that have arisen in consequence of the extraordinary sentences of condemnation passed by the courts of Admiralty in France during this war . . . to a question asked in the course of the argument, what are the rules on which the Courts of Admiralty profess to proceed, I answer, the law of nations, and such treaties as particular states have agreed shall be engrafted on that law. It was said by the defendant's counsel that an ordinance has the same force as a treaty, but without stopping to enlarge on the difference between them it is sufficient to say that the one is a contract made by the contracting parties and that the other is an *ex-parte* ordinance made by one nation only, to which no other state is a party; and I concur with Lord Mansfield in opinion that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances without the concurrence of other nations." Continuing, his lordship said "let us see what was the foundation of the condemnation in the French courts. It is stated that by their ordinance all ships are to be confiscated whensoever on board those ships shall be found a supercargo, merchant, commissary or chief officer being an enemy, but I say they had no right by making such an ordinance to bind other nations." What was the *ratio decidendi* in this case? The decision was based on the ground that the French courts had, in accordance with a French ordinance which was opposed to international law, decided that a ship was liable to be condemned merely because she carried on board an officer whose nationality was that of an enemy. Such then was the view expressed by Lord Kenyon as to the value and effect of a French ordinance which, departing from the recognized custom of nations, decreed that a ship might be condemned merely because she carried an officer of the nationality of the enemy. Applying the principle of that case to the present case, I say that the Russian declaration including provisions among the list of articles absolutely contraband and as departing from the recognised custom of nations had no binding effect upon other nations, and consequently could not excuse the non-performance of the contract under the charter party between

the Osaka Shosen Kaisha and the owners of the s. s. Prometheus. It was contended on behalf of the owners of the Prometheus that the term 'law' as applied to this recognised system of principles and rules known as international law is an inexact expression, that there is, in other words, no such thing as international law; that there can be no such law binding upon all nations inasmuch as there is no sanction for such law, that is to say that there is no means by which obedience to such law can be imposed upon any given nation refusing obedience thereto. I do not concur in that contention. In my opinion a law may be established and become international, that is to say binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot, perhaps, be overcome. Such resistance merely makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation was a party, still subsisting. Could it be successfully contended that because any given person or body of persons possessed for the time being power to resist an established municipal law such law had no existence? The answer to such a contention would be that the law still existed, though it might not for the time being be possible to enforce obedience to it. My answer to the first question put to me by the arbitrator must therefore, for the reasons I have given, be (1) that the cargo intended to be loaded by the charterers on the steamship Prometheus was not contraband of war within the meaning of the charter party; (2) that the Russian declaration constituting provisions unconditional contraband was not binding upon neutrals who were no party thereto, and consequently has no bearing upon the construction of the charter party between the Osaka Shosen Kaisha and the owners of the ship Prometheus. . . .

NOTE.—Whether international law is really law in the proper sense of that term has been a subject of much speculation. Practically all the larger treatises consider the question, and it is also well discussed in the following: Foulke, *International Law*, I, Part I; Reeves, "International Society and International Law," *Am. Jour. Int. Law*, XV, 361; Sherman, "Jus Gentium and International Law," *Ib.* XII, 56, and "The Nature and Sources of International Law," *Ib.* XV, 349; J. B. Scott, "The Legal Nature of International Law," *Ib.* I, 831, a brilliant article criticised by W. W. Willoughby in *Ib.* II, 357; Sir

F. Pollock, "The Sources of International Law," *Col. Law Rev.*, II, 511; Baron Russell of Killowen, "International Law," *Law Quar. Rev.* XII, 337. See also *Thirty Hogsheads of Sugar v. Boyle* (1815), 9 Cranch, 191, 198; *The Antelope* (1825), 10 Wheaton, 66, 120; Moore, *Digest*, I, 1. In *The Ekaterinoslav* (1905), Takahashi, 586, counsel for the claimants of the captured vessel argued that the declarations of the Powers and the resolutions of scholars constitute the rules and usage of international law now in force, and that the Rules of Capture at Sea resolved upon by the Institute of International Law at Turin in 1882, the proposals of the International Peace Conference of 1887, and the amendments resolved upon by the Institute of International Law at Paris in 1885 ought to be taken as the law governing the instant case. Furthermore it was said:

There is no fixed International Law for a state to observe, but any just and impartial practice adopted by it according to circumstances becomes the standard of International Law. In applying the rules of International Law at the time of war, therefore, a state should take into consideration the spirit of the times and the most advanced theories of scholars, basing all its decisions on the great principle of universal benevolence.

In denying the petition, the Higher Prize Court of Japan said:

The Rules of Capture at Sea resolved upon by the Institute of International Law at Turin . . . are nothing more than the desire of scholars, open to further discussion by the Powers. Under International Law they have no authority. . . . As to the advocate's vague argument for governing the solid business of the day by the principle of universal benevolence, it is inadmissible. It ignores the fact that war is indispensable in the present state of national intercourse.

The nature of international law was thus described by Blackstone in his *Commentaries*, IV, 66:

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. This general law is founded upon this principle—that different nations ought in time of peace to do one another all the good they can, and in time of war as little harm as possible, without prejudice to their own real interests. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice in which all the learned of every nation agree; or they

depend upon mutual compacts or treaties between the respective communities, in the construction of which there is also no judge to resort to but the law of nature and reason, being the only one in which all the contracting parties are usually conversant and to which they are equally subject.

The sources from which international law is derived were indicated by Mr. Justice Gray in *The Paquete Habana v. United States* (1899), 175 U. S. 677, 694:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who, by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Confusion is often produced as to the nature of international law by an inexact use of terms. If the phrase international law is confined to that body of rules by which the relations of nations with each other or of one nation with the citizens of other nations are regulated, there yet remain two other branches of jurisprudence which, although they relate only to private interests, are often treated as phases of international law, namely maritime law and the conflict of laws.

Maritime or admiralty law is one of the most ancient branches of jurisprudence. Commerce upon the sea brought about the development of a body of principles for its regulation. Similar needs produced similar rules, and as the parties to the controversies were often citizens of different states, it was desirable that the rules of the various nations should be as nearly alike as possible. At various times the law of the sea has been embodied in something like a code. The law of Rhodes, some sections of the code of Justinian, the *Consolato del Mare*, the laws of Oleron, the laws of Wisburg are all based upon the customs and usages which had grown up, particularly on the Mediterranean, in connection with sea-borne commerce. "Almost all Europe," said Justice Story, "have derived their maritime codes from the Mediterranean; and even in this country we take pride in conforming our decisions to the rules of the venerable *Consolato del Mare*," *The Jerusalem* (1814), 2 Gallison, 191. The maritime law, however, except the law of prize which is applied only in time of war, is not concerned with the relations of nations with each other. If a British vessel assists a Dutch vessel in distress, and a suit for salvage services is brought in an American

court, no international relation is involved. It is merely a question of private rights, and these are determined not by British or Dutch or American law but by the common law of the sea as generally adopted by maritime nations and as received in the United States, *Anderson v. The Edam* (1832), 13 Fed. 135. In *The Scotia* (1872), 12 Wallace, 170, the opinion of the court is confusing because it fails to make this distinction. The maritime law was developed in the early middle ages by the consuls who presided in the courts of the merchants, but as it concerned the sea, its enforcement was very generally committed to the sovereign's chief maritime officer, called in England the Lord High Admiral. To him or to his deputy, the Judge of the Admiralty Court, maritime controversies were brought, and through the Admiralty Court and similar courts in other maritime countries admiralty law has been developed. The history of British admiralty jurisdiction is traced in the monumental opinion of Justice Story in *De Lovio v. Boit* (1815), 2 Gallison, 398. Many of the early maritime codes may be found in the appendix to Peter's *Admiralty Decisions* and in 30 Fed. Cases, 1169. For the relation of admiralty law to the municipal law see *The Lottawanna* (1875), 21 Wallace, 558. For the development of admiralty jurisdiction in the United States see *The Genessee Chief* (1853), 12 Howard, 443 and *United States v. Rodgers* (1893), 150 U. S. 249.

The terms "private international law", "international private law" and "conflict of laws" are applied to that branch of jurisprudence which is concerned with the jurisdiction of states and with the effect to be given in one state to rights acquired or status created in another. In determining what jurisdiction it will exercise, a court does not look to the rules of international law, but to the rules followed in each country for the determination of its own jurisdiction; and great weight will be given to any which have found general acceptance and have become part of the law common to all nations, *British South Africa Co. v. Companhia de Moçambique* [1893] A. C. 602. If a court takes jurisdiction, it must then determine what law it will apply. A British vessel in Dutch waters, while under the control of a Dutch pilot which the local authorities compelled it to take on, damages a Norwegian vessel. Under Dutch law a vessel under the control of a compulsory pilot is liable for the damage which it commits, while under British law it is not. In a suit brought by the Norwegian owner in a British court, which rule should the court apply? *The Halley* (1868), L. R. 2 P. C. 193. After the birth of a child, its parents marry, but their marriage does not legitimate the child in that jurisdiction. Later the parents establish their domicile in a jurisdiction where such a marriage would legitimate the child. Is it legitimate in that jurisdiction? *Smith v. Kelly* (1851), 23 Miss. 167. An American made a will leaving all his property to his brothers and sisters. He then married a French woman in France and established a matrimonial domicile there, but ultimately returned to America and died here leaving his original will unrevoked. Is his widow entitled to one-half of his personal property in accordance with the law of France, or are her rights to be determined by the law of her husband's American domicile? *Harral v. Harral* (1884), 39

N. J. Eq. 279. If a judgment is fraudulently obtained in Russia and suit is brought in England for its enforcement, will the English court give effect to the judgment without admitting proof that the Russian court was deceived? *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295. In all these cases the court is called upon to enforce rights which are created, if created at all, in a foreign jurisdiction. In the course of such adjudication it must determine by what law the rights in question are to be judged. Hence this branch of jurisprudence was named by Justice Story the "conflict of laws". While the term is not altogether satisfactory, it is less misleading than the term "private international law," for in the conflict of laws, as in maritime law, no international state relation is involved.

In the settlement of questions in the conflict of laws appeal is frequently made to the "comity of nations." As to the meaning of this term, the Supreme Court of the United States, in *Hilton v. Guyot* (1895), 159 U. S. 113, 163, said:

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations". Although the phrase has been often criticised, no satisfactory substitute has been suggested.

'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

For a full discussion of the arguments for and against the various terms applied to the conflict of laws, see the introduction to Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, and Beale, *A Treatise on the Conflict of Laws or Private International Law*. Other standard treatises are Story, *The Conflict of Laws*; von Bar, *Private International Law*; Foote, *Private International Law*; Savigny, *A Treatise on the Conflict of Laws*; Westlake, *Conflict of Laws*; and Wharton, *A Treatise on the Conflict of Laws*.

While the system of jurisprudence now known as international law is the product of modern European civilization, it was found in rudimentary forms in classic times and there were well established rules as to the rights of ambassadors and the making of war and peace. The gradual absorption by Rome of all the states of the Mediterranean world put an end to further development, and it was not until the rise of new states in the Middle Ages that there was

any need for rules governing international intercourse. The mediæval scholastic jurists and canonists however began at once to speculate on the nature of international relations and the rules which should control them. Before the publication by Grotius in 1625 of his treatise *De Jure Belli ac Pacis*, which is the foundation of modern international law, the subject had received wide attention and there was in existence a considerable body of writing bearing upon it. Such men as Ayala, Belli, Legnano, Victoria, Suarez, Hooker and Gentili had made substantial contributions to the study of international relations, and their work served as the foundation for the great work of Grotius. See Phillipson, *The International Law and Custom of Ancient Greece and Rome*; Nys, *Les Origines du Droit International*; Vanderpol, *La Doctrine Scholastique du Droit de Guerre*.

Among the oriental nations also, which had a political development entirely independent of that of Europe, international intercourse had resulted in recognized rules for its regulation. The naturalization of foreigners in Japan began as early as 219 B. C. Japan and China began relations with each other about 100 A. D. and they first exchanged ambassadors in 607 A. D. In 609, in reply to a courteous letter from the Emperor of China, the Japanese Emperor sent a reply beginning with the words, "The Emperor of the East seeks respectfully to address the Emperor of the West." But the Emperor of China, who was the ruler of many dependent states, looked upon all other princes as his vassals and thought of himself as the supreme ruler of the world. In 1268 the great Kublai Khan sent a letter to the "king of Japan" in which he said, "The world is my house; how can you expect to be of my family without having relations with me?" In consequence of this point of view, the conception of international relations as intercourse among equals governed by rules which all were bound to observe made less progress in China than in Japan.

Among the principles governing international relations which were developed by Japan were the notion of the equality of sovereign states, the sanctity and dignity of ambassadors, rules as to intervention, protectorates and naturalization, the duty to treat prisoners of war with humanity, the prohibition of the pillaging of enemy property and of certain means of destruction, e. g. poison, the protection of women and priests in time of war and the duty to observe flags of truce. International relations in the Orient however were so circumscribed that international law as a system of jurisprudence remained in a primitive condition until the opening of Japan and China to trade with the Occident. The system of international law which had grown up in Europe was much more fully developed than any similar system in the Orient and its principles were therefore readily accepted. In the war between France and Prussia in 1870, Japan issued a proclamation of neutrality, and this may be said to mark her definite acceptance of the European system of international law. On the development of international law among peoples of non-European civilization see Takahashi, "Le Droit International dans l'Histoire du Japon," *Revue de Droit International* (2nd series), III.

188, and Wheeler, "Etude sur l'Histoire Primitive du Droit International," *Ib.* X, 5.

International law is the outgrowth of modern European civilization and is applied in its fullness only to the states which are the product of that civilization and to Japan. That Empire was accorded full rank as a member of the family of nations when the Christian powers surrendered their consular jurisdiction therein and remitted their subjects to the Japanese tribunals. See Moore, *Digest*, II, 654; Hishida, *The International Position of Japan as a Great Power*, ch. vi. By express agreement of the Powers in 1856 Turkey was declared "admitted to participate in the advantages of the public law and system of Europe," but its sponsors nevertheless continued to maintain their consular jurisdiction therein.

Some of the rights usually recognized by international law as appertaining to sovereign states are still withheld from China, Siam and Persia; but in the case of Siam, the United States has entered into a treaty which involves ultimately the full recognition of Siam by the United States. On December 10, 1921 the Washington Conference on the Limitation of Armament provided for the appointment of a commission to investigate the system of extraterritorial jurisdiction in China and the judiciary of China with a view to handing over their administration to the native government. Later the Conference adopted other resolutions looking to the surrender to China of full control of all governmental agencies in her territory. See *Am. Jour. Int. Law*, XVI, *Supplement*, 76. For the view taken of the relation of Mohammedan countries to international law, see the decisions of Lord Stowell in *The Hurtige Hane* (1801), 3 C. Robinson, 324; *The Helena* (1801), 4 *Ib.* 3; and *The Madonna del Burso* (1802), 4 *Ib.* 169.

SECTION 2. THE RELATION OF INTERNATIONAL LAW TO MUNICIPAL LAW.

THE EMPEROR OF AUSTRIA v. DAY AND KOSSUTH.

THE HIGH COURT OF CHANCERY OF ENGLAND. 1861.
2 Giffard, 628.

[The Hungarian patriot Louis Kossuth arranged with Messrs. Day and Sons, lithographers, for the manufacture in England of a large quantity of paper notes designed to be introduced into Hungary as money and to be circulated there in furtherance of the plans of the revolutionists. When the notes were almost ready for delivery, the Emperor of Austria as King of

Hungary sought to enjoin their further manufacture or the delivery to Kossuth of those already manufactured.]

THE VICE-CHANCELLOR [SIR JOHN STUART] :—

The plaintiff sues in his sovereign character, as King of Hungary. He asks the assistance of the Court to prevent an injury, of a public kind, to what he asserts to be his legal rights. These rights he claims as the acknowledged possessor of the sovereign power in a foreign state at peace with this kingdom.

It appears that the defendants have manufactured and prepared in this country a vast quantity of printed paper, purporting to represent public paper money of Hungary, such as could be lawfully issued by the sovereign power. What they have thus prepared is intended to be circulated at some future time as the public paper money of Hungary. This paper has been thus made and prepared, not only without the license of the plaintiff, but as in exercise of some contemplated power hostile to that of the plaintiff, and intended to supersede it.

What the Court has now to decide is the question, whether the defendants can, by the law of England, be allowed to continue in possession, or to be protected in the possession, of this large quantity of printed paper, manufactured and held by them for such a purpose; or whether, on the other hand, the plaintiff is entitled to have the right of which he claims to be in possession, protected against the invasion of the defendants, and to have delivered up to him what has been thus prepared, and made ready to be used, for a purpose hostile to his existing right:

For the defendants, it has been argued, that this Court has no jurisdiction in such a case; that what is complained of is a public wrong, not cognizable by the law of England, because it relates merely to the public and political affairs of a foreign nation. The defendant's counsel have admitted that a foreign sovereign may have relief in this court, when he sues in his public character to recover public property within the jurisdiction of this Court. But they insist that, what is in question in this cause is not any right of property, but a mere public and political right, which, by the constitution of Hungary, is not absolute in the Sovereign, but subject to the control and direction of the Diet of that kingdom. Such a right, they say, is beyond the jurisdiction of this Court.

If the question related merely to an affair of state, it would

be a question, not of law, but for mere political discussion. But the regulation of the coin and currency of every State is a great prerogative right of the sovereign power. It is not a mere municipal right, or a mere question of municipal law. Money is the medium of commerce between all civilized nations; therefore, the prerogative of each sovereign state as to money is but a great public right recognised and protected by the law of nations. A public right, recognised by the law of nations, is a legal right; because the law of nations is part of the common law of England.

These propositions are supported by unquestionable authority. In the modern version of Blackstone's Commentaries (4 Steph. Com. 282), it is laid down (and it has so always been held in our courts) that the law of nations, wherever any question arises, which is properly the object of its jurisdiction, is adopted in its full extent by the common law of England, and held to be part of the law of the land. Acts of Parliament, which have been from time to time made to enforce this universal law, or to facilitate the execution of its decisions, are not considered as introductive of any new rule, but merely declaratory of the old fundamental constitution of the kingdom, without which it must cease to be part of the civilized world.

To apply these acknowledged principles of the law of nations and law of England to the present case, it appears that the British Parliament, by the Act 11 Geo. 4 & 1 Wm. 4, c. 66, has enacted, that the forgery or counterfeiting the paper money of any foreign sovereign or state is a felony punishable by the law of England. This statute is a legislative recognition of the general right of the sovereign authority in foreign states to the assistance of the laws of this country, to protect their rights as to the regulation of their paper money as well as their coin, and to punish, by the law of England, offences against that power.

The friendly relations between civilized countries require, for their safety, the protection by municipal law of an existing sovereign right of this kind recognised by the law of nations. It appears from the evidence of the defendant Kossuth himself, that the present plaintiff is in possession of the supreme power in Hungary, and that the property now in question, which this defendant has caused to be manufactured in order, at some future time, to issue it as the public paper money of the State of Hungary, is not intended to be immediately used for that

purpose, because of the existing power of the plaintiff. But it also appears, that the paper so manufactured is now in the possession and power of both the defendants, ready to be used, when the defendant Kossuth shall think fit, for a purpose adverse to the existing right of the plaintiff.

The manufactured paper in question, therefore, is property which has been made for no other purpose, and can be used for no other purpose, except one hostile to the sovereign rights of the plaintiff. It is not property of a kind which, like warlike weapons or other property, may be lawfully used for other purposes. And if the avowed and single purpose, for which this property is now in the hands of the defendants, be a purpose hostile to the plaintiff's rights, if this Court were to refuse its interference, the refusal would amount to a decision that it has no jurisdiction to protect the legal right of the plaintiff—a legal right recognised by the law of nations, and, therefore, by the law of England.

But it has been said, that the right of the plaintiff is not an absolute right, but is subject to the control of the Diet of Hungary. The prerogative rights of the Crown of England are all directly or indirectly subject to control of Parliament, and the sovereign rights in most other nations are subject to some control or limitation, yet they are not therefore the less actual rights; and it is at the suit of the sovereign that they are to be protected by the law.

Then, it is said, that the defendant Kossuth contemplates the overthrow of the existing right of the plaintiff, and that when it is overthrown, and the power transferred to himself or to some other body, which shall sanction the use of this paper as the current money of the kingdom of Hungary, he will then be entitled to use it; and therefore, that this Court ought not now to interfere.

To this argument the answer is, that this Court, like other public tribunals, can deal only with existing laws and existing governments. Obedience to existing laws and to existing governments, by which alone the laws can be enforced, are purposes essential to the distribution of justice, and to the maintenance of civil society. Therefore, if by the existing laws the plaintiff has the right which he asserts, and if the defendants have made and have now in their possession the property in question, which has been made and now is in their hands for no other purpose than one hostile to the legal rights of the plaintiff, the legal

right of the plaintiff ought to be protected by the interference of this Court. This right of the plaintiff is clear on principle, unless the Court is to abandon its protective jurisdiction. It is clear, also, upon authority. In the case of *Farina v. Silverlock*, 1 K. & J. 509, an injunction was granted against a printer, who had made and printed papers which he had in his possession, merely because they might be used, and were ready to be used, in such a manner as to violate the legal right of the plaintiff, although they were not in fact actually used for that purpose.

Foreign States at peace with this country have always been held entitled to the assistance of the law of England to vindicate and protect their rights, and to punish offenders against those acknowledged public privileges recognised by the law of nations. Even the sovereign power, under a revolutionary government recognized for the time by the Crown of England as an existing government, has had its rights protected, and offenders against those rights punished by prosecution in the courts of England. The prosecution and conviction of M. Peltier, for a libel on the First Consul of France, proceeded on this principle. In earlier times, Lord George Gordon was tried and convicted for a libel on the Queen of France.

These rights of foreign powers may be for a time suppressed, and the law may be silent during the fragrance of rebellion and revolution, when rights, both public and private, are overturned and destroyed during the crimes and calamities of civil war.

But where, as in the present case, the existing rights of the plaintiff, as Sovereign of Hungary, are recognised by the Crown of England, the relief which he seeks in this cause, is for the protection of a legal right of universal public importance against the acts of the defendants.

That protection can only be effectually afforded by the relief prayed for in this suit; and there must be a decree against the defendants, according to the prayer of the bill.

WEST RAND CENTRAL GOLD MINING COMPANY,
LIMITED v. THE KING.

KING'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE OF ENGLAND.
1905.

Law Reports [1905] 2 K. B. 391.

[The statement of facts and the first part of the opinion are printed, *post*, 98.]

LORD ALVERSTONE, C. J. . . . The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognised and acted upon by our country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations. We adopt the language used by Lord Russell of Killowen in his address at Saratoga in 1896 on the subject of international law and arbitration: "What, then, is international law? I know no better definition of it than that it is the sum of the rules or usages which civilized States have agreed shall be binding upon them in their dealings with one another." In our judgment, the second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if the term "international law" is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which

he cited in support of the proposition are entirely in accord with and, indeed, well illustrate our judgment upon this branch of the arguments advanced on behalf of the suppliants; for instance, *Barbuit's Case*, Cas. t. Tal. 281, *Triquet v. Bath*, 3 Burr. 1478, and *Heathfield v. Chilton*, 4 Burr. 2016, are cases in which the Courts of law have recognised and have given effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield when dealing with the particular and recognised rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and *a fortiori* if they are contrary to the principles of her laws as declared by her Courts. The cases of *Wolff v. Oxholm*, 6 M. & S. 92; 18 R. R. 313, and *Reg. v. Keyn*, 2 Ex. D. 63, are only illustrations of the same rule—namely, that questions of international law may arise, and may have to be considered in connection with the administration of municipal law. . . .

MORTENSEN v. PETERS.

HIGH COURT OF JUSTICIARY OF SCOTLAND. 1906.
14 Scots Law Times Reports, 227.

THE LORD JUSTICE GENERAL. The facts of this case are that the appellant being a foreign subject, and master of a vessel registered in a foreign country, exercised the method of fishing known as otter trawling at a point within the Moray Firth, more than three miles from the shore, but to the west of a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire; that being thereafter found within British territory, to wit, at Grimsby, he was summoned to the Sheriff Court at Dornoch to answer to a complaint against him for having contravened the 7th section of the Herring Fishery Act, 1889, and the bye-law of the Fishery Board, thereunder made, and was convicted. . . .

My Lords, I apprehend that the question is one of construction and of construction only. In this Court we have nothing to do with the question of whether the legislature has or has not

done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an act of the legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms. The counsel for the appellant advanced the proposition that statutes creating offences must be presumed to apply (1) to British subjects; and (2) to foreign subjects in British territory; but that short of express enactment their application should not be further extended. The appellant is admittedly not a British subject, which excludes (1); and he further argued that the *locus delicti*, being in the sea beyond the three-mile limit, was not within British territory; and that consequently the appellant was not included in the prohibition of the statute. Viewed as general propositions the two presumptions put forward by the appellant may be taken as correct. This, however, advances the matter but little, for like all presumptions they may be redargued, and the question remains whether they have been redargued on this occasion.

The first thing to be noted is that the prohibition here, a breach of which constitutes the offence, is not an absolute prohibition against doing a certain thing, but a prohibition against doing it in a certain place. Now, when a legislature, using words of admitted generality—"It shall not be lawful," &c., "Every person who," &c.—conditions an offence by territorial limits, it creates, I think, a very strong inference that it is, for the purpose specified, assuming a right to legislate for that territory against all persons whomsoever. . . .

It is said by the appellant that all this must give way to the consideration that International Law has firmly fixed that a *locus* such as this is beyond the limits of territorial sovereignty; and that consequently it is not to be thought that in such a place the legislature could seek to affect any but the King's subjects.

It is a trite observation that there is no such thing as a standard of International Law, extraneous to the domestic law of a kingdom, to which appeal may be made. International Law, so far as this Court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the Law of Scotland. Now can it be said to be clear by the law of Scotland that the *locus* here is beyond what the legislature may assert right to affect by legis-

lation against all whomsoever for the purpose of regulating methods of fishing? . . . [The remaining portion of the opinion is printed *post*, 151.]

NOTE.—See Holland, *Studies in International Law*, 176; Westlake, *Collected Papers*, 498; Picciotto, *The Relation of International Law to the Law of England and the United States*; Wright, *The Enforcement of International Law Through Municipal Law in the United States*; Butler, *The Treaty-Making Power of the United States*, II, sec. 399; Cobbett, *Cases and Opinions*, I, 15; Hyde, I, 11; Moore, *Digest*, I, 10. In 1765, Blackstone said, "The law of nations (whenever any question arises which is properly the subject of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land." *Commentaries*, IV, 67. To the same effect see *Barbuit's Case* (1736), *Talbot*, 281; *Triquet v. Bath* (1764), 3 *Burrow*, 1478; and *Heathfield v. Chilton* (1767), 4 *Burrow*, 2015, in which Lord Mansfield said, "The privileges of public ministers and their retinue depend upon the law of nations, which is part of the common law of England." The relation of international and municipal law was elaborately discussed in *The Queen v. Keyn* (1876), L. R. 2 *Exc. D.* 63, in which the doctrine of the early cases was somewhat modified by a closely divided court. For criticism of those cases see Cobbett, *Cases and Opinions*, I, 22. In *The Barenfels* (Egypt, 1915), 1 *Br. & Col. P. C.* 122, 129, the British Prize Court for Egypt said:

British law may be said to have always recognized International Law as a certain collection of certain rules which have become binding on States, either by immemorial usage or by virtue of agreement. And when once a rule of law is shewn to have received the assent of civilized States it will be deemed to have received also the assent of the British Courts, and will be applied by Courts sitting in any capacity which necessitates the straying from the ordinary paths of municipal laws to the fields of the Law of Nations.

In the United States prior to the adoption of the Constitution some of the States had recognized international law as part of their municipal law. For instance in *Respublica v. De Longchamps* (1784), 1 *Dallas* (Pa.) 111, 116, it was said, "The first crime in the indictment is an infraction of the law of Nations. This law, in its full extent, is part of the law of this State, and is to be collected from the practice of different Nations, and the authority of writers." In *Chisholm v. Georgia* (1792), 2 *Dallas*, 419, Chief Justice Jay said, "Prior also to that period [1789] the United States had, by taking a place among the nations of the earth, become amenable to the law of nations, and it was their interest as well as their duty to provide that those laws should be respected and obeyed." In *Ware v. Hylton* (1796), 3 *Dallas*, 199, 281, Justice Wilson said, "When the United States declared their independence, they were bound to receive the law of nations in its modern state of purity and refinement." On the same subject see the charges delivered to the grand jury by Chief Justice Jay and

Justice Wilson in *Henfield's Case* (1793), Wharton, *State Trials*, 49. In the exercise of its constitutional power to punish offenses against the law of nations Congress passed an act punishing piracy as defined by the law of nations, and it was held in *United States v. Smith* (1820), 5 Wheaton, 153, that this was a sufficient description of the offense. In *The Nereide* (1815), 9 Cranch, 388, 423, Chief Justice Marshall said that in the absence of any act of Congress to the contrary, "the court is bound by the law of nations, which is a part of the law of the land." The same principle was set forth in *The Paquete Habana v. United States* (1899), 175 U. S. 677, 694. See also *Maisonnaire v. Keating* (1815), 2 Gallison, 325, 334, and *The Amy Warwick* (1863), 2 Black. 635. In *Riddell v. Fuhrman* (1919), 233 Mass. 69, the Supreme Judicial Court of Massachusetts said, "International law is part of the law of the United States, and must be administered whenever involved in causes presented for determination though in a State court."

In Great Britain a legislative act is presumed not to contravene international law, *The Annapolis* (1861), 30 L. J. P. & M. 201, while in the United States, it was said by Chief Justice Marshall that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. The Charming Betsy* (1804), 2 Cranch, 64, 118.

The relative authority of municipal and international law is of particular importance in controversies before prize courts and is discussed in *The Maria* (1799), 1 C. Robinson, 340; *The Walsingham Packet* (1799), 2 Ib. 77; *The Recovery* (1807), 6 Ib. 341; *The Fox* (1811), Edwards, 312; *Le Louis* (1817), 2 Dodson, 239; *The Neptune* (1834), 3 Hagg, 129; *Cope v. Doherty* (1858), 4 K. & J. 367; and *The Zamora* (1916), L. R. [1916] 2 A. C. 77.

CHAPTER II.

PERSONS IN INTERNATIONAL LAW.

SECTION 1. STATES.

THE HELENA.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1801.

4 C. Robinson, 3.

This was a case of a British ship, which had been taken, on a voyage from Saffee to Lisbon, by an Algerine corsair, and sold by the Dey of Algiers to a merchant of Minorca, and by him sold, on the surrender of the island of Minorca to the British arms, to the present holder, a merchant of London. On coming into the port of London, a warrant had been applied for to arrest this ship on the part of the former British proprietor; but the Court refused a warrant, and directed a monition to issue, calling on the possessor to show cause, why she should not be restored to the former British owner. . . .

Sir W. SCOTT [LORD STOWELL].—This is a question arising on a ship, which has been purchased by a British merchant of a Spaniard: A claim is now given on the part of the original British proprietor, on a suggestion that the vessel, while sailing as his property, was captured and carried into the Barbary States, and there sold to the Spanish merchant, from whom the present holder purchased. It is certainly true, as it has been argued on the part of the present possessor, that the Court is disposed to pay particular respect to derivative titles, when fairly possessed; and it does this on the plain and general ground, that there must be a sequel of transactions, continued in a course of time, which shall be held conclusive, to cure antecedent defects, and to give security to the title of a *bonâ fide* purchaser. On this foundation all property rests; with respect to movables, the period is very short for that effect. It is true, that ships pass by formal instruments and written documents, and therefore do

not come entirely under the rules that apply to the transfer of movable property; but still they are entitled to the equity of similar considerations to a certain degree, particularly where positive regulations have not intervened to exclude them. This ship appears to have been taken by the Algerines, and it is argued, that the Algerines are to be considered in this act as pirates, and that no legal conversion of property can be derived from their piratical seizure. Certain it is, that the African States were so considered many years ago, but they have long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states. So long ago as the time of Charles 2d, Molloy speaks of them in language which, though sufficiently quaint, expresses the true character in which they were considered in his time.—

“Pirates that have reduced themselves into a government or state, as those of Algier, Sally, Tripoli, Tunis, and the like, some do conceive ought not to obtain the rights or solemnities of war, as other towns or places: for though they acknowledge the supremacy of the Port, yet all the power of it cannot impose on them more than their own wills voluntarily consent to. The famous Carthage having yielded to the victorious Scipio, did in some respect continue, and began to raise up her drooping towers, till the knowing Cato gave council for the total extirpation; out of the ruins of which arose Tunis, the revenging ghost of that famous city, who now what open hostility denied, by thieving and piracy continue; as stinking elders spring from those places where noble oaks have been felled; and in their art are become such masters, and to that degree, as to disturb the mightiest nations on the western empire; and though the same is small in bigness, yet is great in mischief: the consideration of which put fire into the breast of the aged Lewis IX. to burn up this nest of wasps, who having equipt out a fleet in his way for Palestine, resolved to besiege it: whereupon a council of war being called, the question was, whether the same should be summoned, and carried, it should not; for it was not fit the solemn ceremonies of war should be lavished away on a company of thieves and pirates. Notwithstanding this, Tunis and Tripoli and their Sister Algier do at this day (though nests of pirates) obtain the right of legation. So that now (though indeed pirates) yet having acquired the reputation of a government, they

cannot properly be esteemed pirates, but enemies." Molloy, p. 33, sect. iv.

Although their notions of justice, to be observed between nations, differ from those which we entertain, we do not, on that account, venture to call in question their public acts. As to the mode of confiscation, which may have taken place on this vessel, whether by formal sentence or not, we must presume it was done regularly in their way, and according to the established custom of that part of the world. That the act of capture and condemnation was not a mere private act of depredation, is evident from this circumstance, that the Dey himself appears to have been the owner of the capturing vessel; at least he intervenes to guarantee the transfer of the ship in question to the Spanish purchaser. There might perhaps be cause of confiscation, according to their notions, for some infringement of the regulations of treaty; as it is by the law of treaty only that these nations hold themselves bound, conceiving (as some other people have foolishly imagined) that there is no other law of nations, but that which is derived from positive compact and convention. Had there been any demand for justice in that country on the part of the owners, and the Dey had refused to hear their complaints, there might perhaps have been something more like a reasonable ground to induce this Court to look into the transaction, but no such application appears to have been made. The Dey intervened in the transaction, as legalizing the act. The transfer appears, besides, to have been passed in a solemn manner before the public officer of the Spanish government, the Spanish consul; and in the subsequent instance, the property is again transferred to the present possessor, under the public sanction of the Judge of the Vice Admiralty Court of Minorca.

Under these circumstances, I think it is now much too late for this Court to interfere for the purpose of annulling these several acts of transfer, which appear to have been made, in both instances, with perfect good faith on the part of the several purchasers, and for an equivalent consideration. Without considering at all the question, what rule would have been applied to the case of a *bona fide* purchase from a piratical captor, I shall dismiss the party, and decree the ship to be delivered to the British purchaser.

Party dismissed.

CHEROKEE NATION v. STATE OF GEORGIA.

SUPREME COURT OF THE UNITED STATES. 1831.

5 Peters, 1.

Motion for injunction. This case came before the court on a motion on behalf of the Cherokee nation of Indians, for a subpoena, and for an injunction, to restrain the State of Georgia, the governor, attorney-general, judges, justices of the peace, sheriffs, deputy-sheriffs, constables and others the officers, agents and servants of that state, from executing and enforcing the laws of Georgia, or any of these laws or serving process, or doing anything toward the execution or enforcement of those laws, within the Cherokee territory, as designated by treaty between the United States and the Cherokee nation. . . .

The bill set forth the complainants to be "the Cherokee nation of Indians, a foreign state, not owing allegiance to the United States, nor to any state of this Union, nor to any power, potentate or state, other than their own." "That from time immemorial, the Cherokee nation have composed a sovereign and independent state, and in this character have been repeatedly recognized, and still stand recognized, by the United States, in the various treaties subsisting between their nation and the United States." That the Cherokees were the occupants and owners of the territory in which they now reside, before the first approach of the white men of Europe to the western continent; "deriving their title from the Great Spirit, who is the common father of the human family, and to whom the whole earth belongs." Composing the Cherokee nation, they and their ancestors have been and are the sole and exclusive masters of this territory, governed by their own laws, usages and customs. . . .

The bill proceeded to refer to the treaty concluded at Hopewell, on the 28th November, 1785, "between the commissioners of the United States and head-men and warriors of all the Cherokees," . . . [and to various other treaties]. By those treaties, the bill asserted, the Cherokee nation of Indians were acknowledged and treated with as sovereign and independent states, within the boundary arranged by those treaties. . . .

The bill averred, that this court had, by the constitution and laws of the United States, original jurisdiction of controversies between a state and a foreign state, without any restriction as

to the nature of the controversy; that by the constitution, treaties were the supreme law of the land. That as a foreign state, the complainants claimed the exercise of the powers of the court to protect them in their rights, and that the laws of Georgia, which interfered with their rights and property, should be declared void and their execution be perpetually enjoined. . . .

MARSHALL, CH. J., delivered the opinion of the court.—This bill is brought by the Cherokee nation, praying an injunction to restrain the State of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokee as a political society, and to seize for the use of Georgia, the lands of the nation which have been assured to them by the United States, in solemn treaties repeatedly made and still in force.

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people, once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.

Before we can look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause? The third article of the constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with "controversies" "between a state or citizens thereof, and foreign states, citizens or subjects." A subsequent clause of the same section gives the supreme court original jurisdiction, in all cases in which a state shall be a party. The party defendant may then unquestionably be sued in this court. May the plaintiff sue in it? Is the Cherokee nation a foreign state, in the sense in which that term is used in the constitution? The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a

majority of the judges, been completely successful. They have been uniformly treated as a state, from the settlement of our country. The numerous treaties made with them by the United States, recognise them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognise the Cherokee nation as a state, and the courts are bound by those acts.

A question of much more difficulty remains. Do the Cherokees constitute a *foreign* state in the sense of the constitution? The counsel have shown conclusively, that they are not a state of the Union, and have insisted that, individually, they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state; each individual being foreign, the whole must be foreign.

This argument is imposing, but we must examine it more closely, before we yield to it. The condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence. In general, nations not owing a common allegiance, are foreign to each other. The term *foreign* nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treaties, histories and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves, in their treaties, to be under the protection of the United States; they admit, that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell, which preceded the constitution, "to send a deputy of their choice, whenever they think fit, to congress." Treaties were made with some tribes, by the state of New York, under a then unsettled construction of the confedera-

tion, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence. Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupillage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility. These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the Union to controversies between a state or the citizens thereof and foreign states.

In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbors, ought not to be entirely disregarded. At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union. Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such, that we should feel much difficulty in considering them as designated by the term foreign state, were there no other part of the constitution which might shed light on the meaning of these words. But we think that in construing them, consider-

able aid is furnished by that clause in the eighth section of the third article, which empowers congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In this clause, they are as clearly contradistinguished, by a name appropriate to themselves, from foreign nations, as from the several states composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be, in fair construction, applied to them. The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost, in framing a subsequent article, unless there be something in its language to authorize the assumption.

The counsel for the plaintiffs contend, that the words "Indian tribes" were introduced into the article, empowering congress to regulate commerce, for the purpose of removing those doubts in which the management of Indian affairs was involved by the language of the ninth article of the confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it, as granted in the confederation. This may be admitted, without weakening the construction which has been intimated. Had the Indian tribes been foreign nations, in the view of the convention, this exclusive power of regulating intercourse with them might have been, and, most probably, would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nations. Congress might have been empowered "to regulate commerce with foreign nations, including the Indian tribes, and among the several states." This language would have suggested itself to statesmen who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly.

It has been also said, that the same words have not necessarily the same meaning attached to them, when found in different parts of the same instrument; their meaning is controlled by the context. This is undoubtedly true. In common language, the same word has various meanings, and the peculiar sense in which it is used in any sentence, is to be determined by the con-

text. This may not be equally true with respect to proper names. "Foreign nations" is a general term, the application of which to Indian tribes, when used in the American constitution, is, at best, extremely questionable. In one article, in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate, in terms clearly contradistinguishing them from each other. We perceive plainly, that the constitution, in this article, does not comprehend Indian tribes in the general term "foreign nations;" not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term "foreign state" is introduced, we cannot impute to the convention, the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it.

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion, that an Indian tribe or nation within the United States is not a foreign state, in the sense of the constitution, and cannot maintain an action in the courts of the United States. . . .

If it be true, that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true, that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future. The motion for an injunction is denied.

[MR. JUSTICE JOHNSON and MR. JUSTICE BALDWIN delivered concurring opinions. MR. JUSTICE THOMPSON delivered a dissenting opinion in which MR. JUSTICE STORY concurred.]

NOTE.—In *Worcester v. Georgia* (1832), 6 Peters, 515, Chief Justice Marshall again made an elaborate analysis of the status of the Indian tribes and affirmed the position taken in *Cherokee Nation v. Georgia* (1831), 5 Peters, 1. In the course of his opinion he said:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on

themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense. . . .

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States.

The act of the State of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity.

For further discussion of the peculiar status of the American Indians see the concurring opinion of Justice Baldwin in *Cherokee Nation v. Georgia* (1831), 5 Peters, 1, 31, which contains a valuable resumé of the treaties and statutes pertaining to the Indian tribes prior to the adoption of the Constitution; *United States v. Rogers* (1846), 4 Howard, 567; *Ex parte Crow Dog* (1883), 109 U. S. 556; *Elk v. Wilkins* (1884), 112 U. S. 94; *Cherokee Trust Funds* (1886), 117 U. S. 288; *United States v. Kagama* (1886), 118 U. S. 375; *Cherokee Nation v. Southern Kansas Ry. Co.* (1890), 135 U. S. 641; *Lone Wolf v. Hitchcock* (1903), 187 U. S. 553; *United States v. Sandoval* (1913), 231 U. S. 28; *Woodward v. de Graffenried* (1915), 238 U. S. 284; *United States v. Nice* (1916), 241 U. S. 591, and a learned paper by J. B. Thayer on "A People without Law," in his *Legal Essays*, 91. As to the Crown's rights to the lands of the Indians after the cession of Canada by France to Great Britain, see *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), L. R. 14 A. C. 46.

THORINGTON v. SMITH.

SUPREME COURT OF THE UNITED STATES. 1868.

8 Wallace, 1.

Appeal from the District Court for the Middle District of Alabama.

[In 1864 Thorington sold to Smith and Hartley some land in Alabama, of which State all the parties were residents. The purchase price was \$45,000, of which \$35,000 was paid in Confederate notes when the deed was executed. For the remainder a note was given promising to pay to Thorington or bearer "ten thousand dollars." At the time of the transaction Alabama was under the control of the Confederate government, and the only money in circulation was Confederate paper currency. Thorington brought suit on the note, and claimed payment of \$10,000 in the only money now current, i. e. lawful money of the United States. The defendants answered that the land was worth only \$3,000 in lawful money, and that the agreement of the parties was that the whole of the purchase price should be paid in the only money then circulating in Alabama, i. e. Confederate notes. The court below held that the contract was illegal because to be paid in such notes and dismissed the bill.]

The CHIEF JUSTICE [CHASE] delivered the opinion of the court.

The questions before us upon this appeal are these:

1. Can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so-called Confederate States, be enforced at all in the courts of the United States? . . . [The second and third questions are omitted.]

The first question is by no means free from difficulty. It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the government of the United States, by insurrectionary force. Nor is it a doubtful principle of law that no contracts made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed. But, was the contract of the parties to this suit a contract of that character? Can it be fairly described as a contract in aid of the rebellion?

In examining this question the state of that part of the country in which it was made must be considered. It is familiar history, that early in 1861 the authorities of seven States, supported, as was alleged, by popular majorities, combined for the overthrow of the National Union, and for the establishment, within its boundaries, of a separate and independent confederation. A governmental organization, representing these States, was established at Montgomery in Alabama, first under a provisional constitution, and afterwards under a constitution intended to be permanent. In the course of a few months, four other States acceded to this confederation, and the seat of the central authority was transferred to Richmond, in Virginia. It was, by the central authority thus organized, and under its direction, that civil war was carried on upon a vast scale against the government of the United States for more than four years. Its power was recognized as supreme in nearly the whole of the territory of the States confederated in insurrection. It was the actual government of all the insurgent States, except those portions of them protected from its control by the presence of the armed forces of the National government.

What was the precise character of this government in contemplation of law?

It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto* government will, we think, conduct us to a conclusion sufficiently accurate.

There are several degrees of what is called *de facto* government.

Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason; and under certain limitations, obligations assumed by it in behalf of the country, or otherwise, will, in general, be respected by the government *de jure* when restored.

Examples of this description of government *de facto* are found in English history. The statute 11 Henry VII., c. 1, 2

British Stat. at Large, 82, relieves from penalties for treason all persons who, in defence of the king, for the time being, wage war against those who endeavor to subvert his authority by force of arms, though warranted in so doing by the lawful monarch, 4 [Blackstone's] Commentaries, 77.

But this is where the usurper obtains actual possession of the royal authority of the kingdom: not when he has succeeded only in establishing his power over particular localities. Being in possession, allegiance is due to him as king *de facto*.

Another example may be found in the government of England under the Commonwealth, first by Parliament, and afterwards by Cromwell as Protector. It was not, in the contemplation of law, a government *de jure*, but it was a government *de facto* in the most absolute sense. It incurred obligations and made conquests which remained the obligations and conquests of England after the restoration. The better opinion doubtless is, that acts done in obedience to this government could not be justly regarded as treasonable, though in hostility to the king *de jure*. Such acts were protected from criminal prosecution by the spirit, if not by the letter, of the statute of Henry the Seventh. It was held otherwise by the judges by whom Sir Henry Vane was tried for treason, 6 State Trials, 119, in the year following the restoration. But such a judgment, in such a time, has little authority.

It is very certain that the Confederate government was never acknowledged by the United States as a *de facto* government in this sense. Nor was it acknowledged as such by other powers. No treaty was made by it with any civilized state. No obligations of a National character were created by it, binding after its dissolution, on the States which it represented, or on the National government. From a very early period of the civil war to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1), that its existence is maintained by active military power, within the territories, and against the rightful authority of an established and lawful government; and (2), that while it exists, it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become re-

sponsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered, also, by civil authority, supported more or less directly by military force.

One example of this sort of government is found in the case of Castine, in Maine, reduced to British possession during the war of 1812. From the 1st of September, 1814, to the ratification of the treaty of peace in 1815, according to the judgment of this court in *United States v. Rice*, 4 Wheaton, 253, "the British government exercised all civil and military authority over the place." "The authority of the United States over the territory was suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose." It is not to be inferred from this that the obligations of the people of Castine as citizens of the United States were abrogated. They were suspended merely by the presence, and only during the presence, of the paramount force. A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court, in *Fleming v. Page*, 9 Howard, 614, that, although Tampico did not become a port of the United States in consequence of that occupation, still, having come, together with the whole State of Tamaulipas, of which it was part, into the exclusive possession of the National forces, it must be regarded and respected by other nations as the territory of the United States. These were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part.

The central government established for the insurgent States differed from the temporary governments at Castine and Tampico, in the circumstance, that its authority did not originate in lawful acts of regular war, but it was not, on that account, less actual or less supreme. And we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it, in its military character, very soon

after the war began, from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be enemies' territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority in civil and local matters not only a necessity but a duty. Without such obedience, civil order was impossible.

It was by this government exercising its power throughout an immense territory, that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, these notes were nullities; for, except in that event, there could be no payer. They bore, indeed, this character upon their face, for they were made payable only "after the ratification of a treaty of peace between the Confederate States and the United States of America." While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force.

It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency, cannot be regarded for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been

entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation. The first question, therefore, must receive an affirmative answer. . . .

NEELY v. HENKEL.

SUPREME COURT OF THE UNITED STATES. 1901.
180 U. S. 109.

Appeal from the Circuit Court of the United States for the Southern District of New York.

[Neely, an employe of the postal department of the Island of Cuba while that Island was occupied by the United States, was arrested in New York charged with the embezzlement and conversion of money and other public property in his possession. Application for his extradition was made by the United States in accordance with the provisions of the act of June 6, 1900, governing the surrender of persons charged with the commission of certain offenses in "any foreign country or territory . . . occupied by or under the control of the United States." Neely resisted extradition on the ground that Cuba was not a foreign country.]

MR. JUSTICE HARLAN delivered the opinion of the court. . . .

That at the date of the act of June 6, 1900, the Island of Cuba was "occupied by" and was "under the control of the United States" and that it is still so occupied and controlled, cannot be disputed. This court will take judicial notice that such were, at the date named and are now, the relations between this country and Cuba. So that the applicability of the above act to the present case—and this is the first question to be examined—depends upon the inquiry whether, within its meaning, Cuba is to be deemed a *foreign* country or territory.

We do not think this question at all difficult of solution if regard be had to the avowed objects intended to be accomplished by the war with Spain and by the military occupation of that Island. Let us see what were those objects as they are disclosed

by official documents and by the public acts of the representatives of the United States. . . .

While by the act of April 25, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several States to such extent as was necessary, to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States but only for the purpose of compelling the relinquishment by Spain of its authority and government in that Island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the Government, by the joint resolution of April 20, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction or control over Cuba "except for the pacification thereof," and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view and, so far as the court is informed by the public history of the relations of this country with that Island, nothing has been done inconsistent with the declared object of the war with Spain.

Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a Military Governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the Island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—Cuba, upon the cessation of hostilities with Spain and after the Treaty of Paris was to be treated as if it were conquered territory. But as between the United States and Cuba that Island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

In his message to Congress of December 6, 1898, the President said that "as soon as we are in possession of Cuba and have pacified the Island, it will be necessary to give aid and direction to its people to form a government for themselves," and that "until there is complete tranquillity in the Island and a stable government inaugurated, military occupation will be continued." Nothing in the Treaty of Paris stands in the way of this declared object, and nothing existed, at the date of the passage of the act of June 6, 1900, indicating any change in the policy of our Government as defined in the joint resolution of April 20, 1898. In reference to the declaration in that resolution of the purposes of the United States in relation to Cuba, the President in his annual message of December 5, 1899, said that the pledge contained in it "is of the highest honorable obligation, and must be sacredly kept." Indeed, the Treaty of Paris contemplated only a temporary occupancy and control of Cuba by the United States. While it was taken for granted by the treaty that upon the evacuation by Spain, the island would be occupied by the United States, the treaty provided that "so long as such occupation shall last" the United States should "assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property." It further provided that any obligations assumed by the United States, under the treaty, with respect to Cuba, were "limited to the time of its occupancy thereof," but that the United States, upon the termination of such occupancy, would "advise any government established in the Island to assume the same obligations." . . .

NOTE.—The Classification of States.—Writers upon politics and government have made many elaborate classifications of states based chiefly upon their forms of government. From the standpoint of international law these differences in form may be disregarded except in so far as they affect international relations. As entities possessed of international rights and subject to international obligations, states are the subjects of international law. Those rights and obligations do not depend upon the form of their internal organization, although their ability to assert the one and to discharge the other may be much affected thereby. Neither, in theory, do the rights and obligations of a state depend upon its physical power. "No principle of general law," said Chief Justice Marshall, "is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights." The Antelope (1825) 10 Wheaton, 66; Westlake, *Collected Papers*, ch. vii; Dickinson, *The Equality of States in International Law*, but compare Hicks, "The Equality of Nations,"

Proceedings, American Society of International Law, 1909, 238. With rights go obligations, and a state which fails to provide for the discharge of its international responsibilities is nevertheless internationally liable. It is the duty of every member of the family of nations to provide itself with such a governmental organization as will enable it to meet all those duties and obligations which its position imposes upon it. The United States is an unhappy example of failure in this regard. It has several times happened, notably in the case of the Italian subjects who were lynched at New Orleans in 1891, that the Federal Government has had to confess that it owed duties which it was unable to discharge. In the New Orleans case, the Government of Italy with perfect right demanded that the guilty parties be prosecuted, but the State Department answered that under the American constitutional system such offenses were within the exclusive jurisdiction of the States. The Federal Government, however, paid a money indemnity to the families of the murdered men. President Harrison, who was then in office, recommended that the Federal courts be given jurisdiction over all cases involving a violation of treaty rights. As yet Congress has taken no action in the matter, thus leaving the Federal Government in what President Taft has described as "a pusillanimous position." See Borchard, secs. 82, 89, 90 and 91, and authorities cited. On all that has to do with international responsibility for the protection of aliens, Borchard is the best guide.

Since the Constitution of the United States vests the complete control of foreign affairs in the Federal Government, the States are unknown in international relations, but some of the States of the German Empire retained the right to act directly in international affairs. Under the constitution of the German republic adopted in 1919, the control of all foreign affairs has been practically centralized in Berlin. Until the outbreak of the Great War, the British Empire was always treated as one international unit, but in consequence of the part played in the war by the self-governing dominions and the Empire of India, they were given independent representation at the Peace Conference, in the Assembly of the League of Nations, at various international conferences held for the consideration of questions growing out of the war, and at the Washington Conference on the Limitation of Armament. They are also eligible to membership in the Council of the League. Sometimes however a delegate has represented more than one section, as in the negotiation of peace between the Allies and Austria in which Viscount Milner represented both Great Britain and the Union of South Africa. In practice this representation has proven to be real and not nominal, and on many important questions delegates from the various portions of the Empire did not vote as a unit. On the classification of states, see Bonfils (Fauchille), sec. 165; Garner, *Introduction to Political Science*, chapters v, vi and vii; Oppenheim, I, Part I, ch. i; Cobbett, *Cases and Opinions*, 1, 42; Hyde, I, 23; Moore, *Digest*, I, 21.

The position of the Papacy has been the subject of frequent discussion. See Bonfils (Fauchille), sec. 370, arguing that the Papacy

is a member of the community of states, and *contra*, Oppenheim, I, 157, Wheaton (Phillipson), 56, and a scholarly article by Dr. A. Pearce Higgins, "The Papacy and International Law," in *Journal of the Society of Comparative Legislation*, n. s. IX, 252. Since the Pope's legal status is based upon the Italian Law of Guarantees of May 13, 1871, a measure against which the Papacy still protests and the continuance of which rests in the discretion of the Italian Government, and since membership in the family of nations is at the present time always associated with sovereignty over definite territory, it is difficult to find a secular basis for the recognition of a purely secular pretension. This seems to have been the view of the First Hague Conference, which refused to admit the Papal envoy to membership.

Recognition.—Recognition that a state possesses those qualities or characteristics which are necessary to international intercourse is a prerequisite to its acceptance as a member of the family of nations. Such recognition does not create the state as a state, but merely acknowledges an existing fact. Whether a community is entitled to recognition is not always easy to determine. In the seventeenth century, the nations of Europe were in much doubt as to whether the Turks and Algerians should be treated as pirates or as sovereign powers, Marsden, *Law and Custom of the Sea*, I, xivii. Since the recognition of a new state or a new government is fundamentally a political act, it seldom presents questions of a justiciable nature which the courts will undertake to decide. The principles which should govern the conduct of the political departments of the government in according or withholding recognition of independence have nowhere been better stated than in the letter of August 24, 1818 from John Quincy Adams, Secretary of State, to President Monroe. Referring to the revolts against Spain in South America, he said:

There is a stage in such contests when the parties struggling for independence have, as I conceive, a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when independence is established as a matter of fact so as to leave the chances of the opposite party to recover their dominion utterly desperate. The neutral nation must, of course, judge for itself when this period has arrived; and as the belligerent nation has the same right to judge for itself, it is very likely to judge differently from the neutral and to make it a cause or pretext for war, as Great Britain did expressly against France in our Revolution, and substantially against Holland. If war thus results in point of fact from the measure of recognizing a contested independence, the moral right or wrong of the war depends upon the justice and sincerity and prudence with which the recognizing nation took the step. I am satisfied that the course of the South Americans as far as it consists of the assertion of independence against Spain, is just. But the justice of a cause, however it may enlist individual feelings in its favor, is not sufficient to justify third

parties in siding with it. The fact and the right combined can alone authorize a neutral to acknowledge a new and disputed sovereignty. The neutral may, indeed, infer the right from the fact, but not the fact from the right.

Moore, *Digest*, I, 78.

A new state which establishes itself by successful revolution does not derive its life from the treaty by which the parent state recognizes its independence. Whatever the language employed, such a treaty is in effect an acknowledgment that the new state has ceased to be under the jurisdiction of the parent state. Hence the independence of the United States is held to date from 1776 and not from the treaty of peace with Great Britain in 1783, *Ware v. Hylton* (1796), 3 Dallas, 199, 227; *McIlvaine v. Coxe's Lessee* (1808), 4 Cranch, 209, 212; *Harcourt v. Gaillard* (1827), 12 Wheaton, 523, 527; *United States v. Repentigny* (1866). 5 Wallace, 211.

Recognition is often confused with intervention. When France recognized the independence of the United States in 1778, the fortunes of the rebelling colonies were at a low ebb and there was little prospect that they would be able to establish their independence. Still less had Panama, which rebelled against Colombia on November 3, 1903, made itself an independent state when it was recognized by President Roosevelt twelve days later. Neither France nor the United States could "recognize" what did not exist. Both cases were examples of intervention. In his message of January 4, 1904, President Roosevelt described a clear case of intervention although he persisted in calling it recognition. He said:

By the unanimous action of its people, without the firing of a shot—with a unanimity hardly before recorded in any similar case—the people of Panama declared themselves an independent republic. The recognition by this Government was based upon a state of facts in no way dependent for its justification upon our action in ordinary cases. I have not denied, nor do I wish to deny, either the validity or the propriety of the general rule that a new state should not be recognized as independent till it has shown its ability to maintain its independence. This rule is derived from the principle of non-intervention, and as a corollary of that principle has generally been observed by the United States. But, like the principle from which it is deduced, the rule is subject to exceptions; and there are in my opinion clear and imperative reasons why a departure from it was justified and even required in the present instance. These reasons embrace, first, our treaty rights; second, our national interests and safety; and, third, the interests of collective civilization.

The comment of the Australian jurist Dr. Pitt Cobbett (*Cases and Opinions*, I, 156) on this transaction was as follows:

The facts appear to be that the Government of Colombia having held out for unreasonable terms, the United States

arranged for the setting up of a new State, which was more amenable to American influences and favourable to American interests.

On the recognition of Panama, see Moore, *Digest*, III, sec. 344, where many of the official documents are given; Freehof, *America and the Canal Title* (a strong indictment of Roosevelt's action); Root, *Addresses on International Subjects*, 175-206 (a defense of the recognition of Panama). On the recognition of other countries of Latin America, see Latané, *The Diplomatic Relations of the United States and Spanish America*; Paxson, *The Independence of the South American Republics*; Callahan, *Cuba and International Relations*; Robertson, "The Recognition of the Spanish Colonies by the Motherland," *Hispano-American Historical Review*, I, 70.

On the general principles of recognition, see Bonfils (Fauchille), sec. 195; Hyde, I, 56; and Moore, *Digest*, I, ch. iii.

It is sometimes attempted to distinguish between recognition of a government and recognition of a state. At bottom the two rest upon essentially the same principles. If a government, whether *de facto* or *de jure*, is actually exercising the authority of government in a given territory and is able and willing to meet its obligations as a member of the family of nations, it is entitled to recognition by all governments except those claiming a superior right, and even the latter must ultimately yield to the facts. Each country is free to set up such government as it likes, but any government which seeks recognition from other governments must show itself able to meet its international duties. The Soviet Government of Russia has not been recognized by the United States because its leaders openly announced that they did not regard any agreements which they might make with non-Bolshevik governments as binding upon them and because it was known that the Soviet Government was subsidizing Bolshevik revolutions throughout the world. See Secretary Colby's statement of August 18, 1920, quoted in Hyde, I, 73. For an account of President Wilson's refusal to recognize the Huerta government in Mexico see Hyde, I, 71, and the authorities there cited.

Even though the political departments of a government refuse to accord recognition to the government, whether *de jure* or *de facto*, of another country, no reason is apparent why the courts should not take note of its existence and operation. Although there may be good cause for refusing to enter into political relations with it, that cannot alter the fact of its existence. The principles supported by the Soviet Government of Russia may make other countries unwilling to give it political recognition, but the fact remains that for several years it has been the government of Russia, and for the time being it is the authorized agent of the Russian state. Its right to act for Russia should therefore be admitted even though no political relations with it are entered into. It would seem therefore that if it should dispose of property in the United States belonging to the Russian state, its right to convey title should not be questioned. See "Judicial Determination of the Status of Foreign Governments," *Harvard Law Review*, XXXV, 607.

Some of the consequences of a refusal to recognize a *de facto* government are seen in the relations of the United States and Soviet Russia. After the overthrow of the Czar's government in March, 1917, the Provisional Government of Russia, popularly known as the Kerensky Government, was recognized by the United States, and Boris Bakhmeteff was received as its ambassador. After the overthrow of the Provisional Government by the Soviet Government, the United States refused to recognize the latter, but continued to recognize Mr. Bakhmeteff as the representative of Russia. On May 6, 1921, the State Department issued a statement in which it said, "As the United States Government has not recognized the Bolshevik regime in Moscow as a government, extreme caution should be exercised as to representations made by any one purporting to represent the Bolshevik government." Mr. Bakhmeteff continued as Russian Ambassador in Washington until June, 1922, when he withdrew, and the Embassy was left in the hands of a Chargé d'Affaires who had also been appointed by the Provisional Government.

When the courts are in doubt as to the status of a foreign country or its government, it is customary for them to make inquiry of the executive department of their own government. In the case of *The Charkieh* (1873) L. R. 4 Ad. & Ecc. 59, Sir Robert Phillimore had recourse to other sources of information in order to determine the status of the Khedive of Egypt, and for this he was criticised by Lord Esher in *Mighell v. Sultan of Johore* (1894), L. R. [1894] 1 Q. B. 149, 158. The information given in response to inquiry is sometimes so ambiguous as to make it difficult to determine whether recognition has been accorded or not. In the case of the government of Esthonia, the court sought information as to its status from the Foreign Office of Great Britain with this result:

The law officers attended . . . and informed His Lordship that it had for the time being, provisionally and with all necessary reservations as to the future, recognized the Esthonian National Council as a *de facto* independent body; and His Majesty's Government had accordingly received certain gentlemen as the informal diplomatic representatives of the Esthonian Provisional Government. Further, it was the view of His Majesty's Government, without in any way binding itself as to the future, that the Esthonian Government was such a Government as could, if it thought fit, set up a prize court.

The court accepted this statement as sufficient evidence of recognition, *The Gagara* (1919), L. R. [1919] P. 95, 97.

A similar inquiry as to the status of the Provisional Government of Northern Russia elicited this statement:

The Provisional Government of Northern Russia is composed of Russian groups who do not recognize the authority of the Russian Central Soviet Government established at Moscow. The seat of the Government is Archangel, and it extends its authority over the territory surrounding that port

and to the west of the White Sea up to the Finnish frontier. As the title assumed by that Government indicates, it is merely provisional in nature, and has not been formally recognized either by His Majesty's Government or by the Allied Powers as the Government of a sovereign independent state. His Majesty's Government and the Allied Powers are however at the present moment co-operating with the Provisional Government in the opposition which that Government is making to the forces of the Russian Soviet Government, who are engaged in aggressive military operations against it, and are represented at Archangel by a British Commissioner. The representative of the Provisional Government in London is Monsieur Nabokoff, through whom His Majesty's Government conducts communications with the Archangel Provisional Government.

The court held that this statement did not indicate that the Provisional Government of Northern Russia had been recognized by the British Government, *The Annette*; *The Dora* (1919), L. R. [1919] P. 105, 111.

A group of British and Belgian officers and soldiers were at Murmansk, which had been under the Government of Northern Russia, when the town was captured by the Bolsheviks. The British and Belgians, who would probably have been killed if they had remained, could have escaped to Norway by land, but they decided instead to seize the steamer *Lomonosoff*, then lying in the harbor, which they navigated to a Norwegian port where they turned it over to the owners and claimed salvage on the ground that they had saved the ship from the Bolsheviks. In the action brought to enforce this claim, the owners set up several defenses, among them being that the plaintiffs had merely saved the ship from passing from the control of one government to the control of another. On this point the court, in *The Lomonosoff* (1920), L. R. [1921] P. 97, 105, said:

It is obvious that this court, respecting the comity of nations, would never treat as a meritorious service the act of persons who in defiance of the laws of an established government recognized by and in friendship with this country, took a ship out of the lawful control of such a government. But at Murmansk on February 21 there was no government recognized by this country and indeed no established government at all. There was for the moment a state of anarchy, during which armed men were taking possession of all the ships they could get at. It is true that, so far as I can judge, they were not strictly pirates in the sense that they were persons who plundered indiscriminately for their own private ends. But, on the other hand, they were not acting with the authority of a politically organized society which at the time was recognized by this country. There is nothing, therefore, in the comity of nations which compels this Court to treat the rescue as a rescue from lawful authority.

I hold that the danger was one to which this Court can have regard and a rescue from which this Court can reward. It is not the same as, but it is analogous to, a rescue from pirates or mutineers, which this Court has always recognized as the subject of salvage.

In a few instances courts have intimated that in the absence of recognition by the political department of the government, the question of the independence of a state is open to proof, *Consul of Spain v. The Conception* (1819), 6 Federal Cases, 359; *Yrisarri v. Clement* (1825), 2 C. & P. 223; (1826), 3 Bing. 432. Questions of international status however are usually treated as political rather than judicial questions, and the courts will follow the decisions of the political departments of the government. In *Rose v. Himely* (1808), 4 Cranch, 240, 272, in considering the status of San Domingo, then in revolt against France, Chief Justice Marshall said:

It has been argued that the colony, having declared itself a sovereign state, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations, as sovereign in fact, and as being entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. In support of this argument, the doctrines of Vattel have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, not to courts. It is for governments to decide, whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.

See also *City of Berne v. Bank of England* (1804), 9 Ves. 347; *The Pelican* (1809), Edwards, App. D.; *Jones v. Garcia Del Rio* (1823), Tur. & Rus. 297; *Taylor v. Barclay* (1828), 2 Sim. 213; *Thompson v. Barclay* (1828), 6 L. J. (O. S.) Ch. 93; S. C. (1831), 9 L. J. (O. S.) Ch. 215; *The Ionian Ships* (1855), 2 Spinka, 212; *Republic of Peru v. Dreyfus* (1888), L. R. 38 Ch. D. 348; *Migheill v. Sultan of Johore* [1894], 1 Q. B. 149; *Foster v. Globe Venture Syndicate* [1900], 1 Ch. 84; *Aksionairnoye Obschestro A. M. Luther v. James Sagor & Co.* (1920), L. R. [1921] 1 K. B. 456; *Gelston v. Hoyt* (1818), 3 Wheaton, 246; *United States v. Palmer* (1818), 3 Ib. 610; *The Divina Pastora* (1819), 4 Ib. 52; *The Santissima Trinidad* (1822), 7 Ib. 283; *Kennett v. Chambers* (1852), 14 Howard, 38; *United States v. Baker* (1861), 24 Federal Cases, 962; *The Three Friends* (1897), 166 U. S. 1; *Underhill v. Hernandez* (1897), 168 U. S. 250; *Oetjen v. Central Leather Co.* (1918), 246 U. S. 297; *Molina v. Comision Reguladora del Mercado de Henequen* (1918), 92 N. J. Law, 38.

It is generally believed that to allow a government to sue in the courts of a country which has not recognized it would set the courts of that country in opposition to its political departments. It is therefore well-settled that such a government shall not be allowed access

to the courts as a plaintiff, *Russian Socialist Federated Soviet Government v. Cibrario* (1921), 191 N. Y. Supp. 543; *The Rogdal* (1920), 278 Fed. 294; *The Penza* (1921), 277 Fed. 91; but the same reasons do not apply if an unrecognized government appears as a defendant. If the courts adjudicate claims asserted against it they do not thereby embarrass the action of the political departments nor impair their freedom in passing upon the question of recognition. Such a suit has therefore been allowed, *Wulfsohn v. Russian Soviet Government* (1922), 66 N. Y. L. J. 1711, discussed in *Harvard Law Review*, XXXV, 768.

The League of Nations.—The League of Nations is a new organization whose status in international law is as yet undetermined. Throughout the Great War many men in many countries were giving thought to plans for the settlement of international controversies and the prevention of war. Projects for international organization, in the elaboration of which Leon Bourgeois, former Prime Minister of France, Lord Robert Cecil, former Minister of Blockade of Great Britain, General Louis Botha, former Minister of Defence of the Union of South Africa, and Woodrow Wilson, then President of the United States, had taken the leading part, were laid before the Peace Conference, and owing chiefly to the insistence of President Wilson that the Conference should provide some machinery for international administration and adjustment of differences in time of peace, the Covenant of the League of Nations was adopted and incorporated in the Treaty of Peace with Germany, and has been accepted by more than fifty countries. No applicant for admission to the League has been refused. The only non-member states are Russia, Germany, Turkey, Egypt, Ecuador, Mexico and the United States. The objects of the League are stated in the preamble to the Covenant (Part I of the Treaty of Versailles) in the following words:

THE HIGH CONTRACTING PARTIES,

In order to promote international co-operation and to achieve international peace and security

by the acceptance of obligations not to resort to war,
by the prescription of open, just and honourable relations
between nations,

by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and

by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another,

Agree to this Covenant of the League of Nations.

The seat of the League is at Geneva, Switzerland. Its government is vested in a Council and an Assembly. These two bodies, in accordance with the terms of the Covenant, have established the Permanent Court of International Justice at The Hague. As to the Permanent Court see Hudson, "The Permanent Court of International Justice," *Harvard Law Review*, XXXV, 245. The statute establishing the Court forms an appendix to this article. The Treaty of Versailles

also created an International Labor Office as part of the organization of the League of Nations.

On the League of Nations see Temperley, *History of the Peace Conference of Paris*; Sir Geoffrey Butler, *Handbook to the League of Nations, with an introduction by Lord Robert Cecil*; Duggan, *The League of Nations: the Principle and the Practice*; Erzberger, *The League of Nations*; Lord Grey of Falloden, *The League of Nations*; Haskins and Lord, *Some Problems of the Peace Conference*; House, *What Happened at Paris*; Lawrence, *The Society of Nations: Its Past, Present and Possible Future*; Oppenheim, *The League of Nations and its Problems*; Sir George Paish, *The Nations and the League*; Lord Eustace Percy, *The Responsibilities of the League*; Pillet, *De l'Idée d'une Société des Nations*; Sir Frederick Pollock, *The League of Nations*.

SECTION 2. PROTECTORATES.

THE KING v. THE EARL OF CREWE.

THE COURT OF APPEAL OF ENGLAND. 1910.

Law Reports [1910] 2 K. B. 576.

[By treaties with the native tribes, Bechuanaland was placed under the jurisdiction of the British Crown, and in 1885, by an Order in Council, was erected into a protectorate. By another Order in Council in 1891, the British High Commissioner for South Africa was empowered to provide for the peace and good order of all persons under the jurisdiction of the Crown in South Africa. A controversy having arisen in one of the tribes as to who was its rightful chief, the High Commissioner, under authority of the Order in Council of 1891, directed that Sekgome, one of the claimants who was then outside the tribal limits, should be detained in custody lest his return to the tribe should provoke bloodshed. Sekgome then endeavored to obtain his release by a writ of habeas corpus directed to the Earl of Crewe, Secretary of State for the Colonies. The writ was denied on the ground that application had not been made to the right court and that the Earl of Crewe did not have the custody of the prisoner. On appeal this decision was affirmed. Only so much of one of the opinions is given as relates to the nature of protectorates.]

KENNEDY, L. J. . . . Sekgome was born and has remained

a member of a native African tribe, dwelling in a region which has for some years . . . become officially entitled "The Batawana Native Reserve," near Lake Ngami, within the Bechuanaland Protectorate. Now the features of Protectorates differ greatly, and of this a comparison of the British Protectorates of native principalities in India, the British Protectorate of the Ionian Islands between 1815 and 1864, the Protectorate of the Federated Malay States, and the Bechuanaland Protectorate . . . affords ample illustration. . . . The one common element in Protectorates is the prohibition of all foreign relations except those permitted by the protecting State. Within a Protectorate, the degree and the extent of the exercise by the protecting State of those sovereign powers which Sir Henry Maine has described (*International Law*, p. 58) as a bundle or collection of powers which may be separated one from another, may and in practice do vary considerably. In this Bechuanaland Protectorate every branch of such government as exists—administrative, executive, and judicial—has been created and is maintained by Great Britain. What the idea of a Protectorate excludes, and the idea of annexation on the other hand would include, is that absolute ownership which was signified by the word "*dominium*" in Roman law, and which, though perhaps not quite satisfactorily, is described as territorial sovereignty. The protected country remains in regard to the protecting State a foreign country; and, this being so, the inhabitants of a Protectorate, whether native born or immigrant settlers, do not by virtue of the relationship between the protecting and the protected State become citizens of the protecting State. As Dr. Lushington said in regard to the inhabitants of the Ionian States, then under a British Protectorate, in his judgment in *The Ionian Ships* (1855), 2 Ecc. & Adm. 212, 226, "allegiance in the proper sense of the term undoubtedly they do not owe; because allegiance exists only between the Sovereign and his subjects, properly so called, which they are not." A limited obedience the dwellers within a Protectorate do owe, as a sort of equivalent for protection; and in the present case the Orders in Council relating to the Bechuanaland Protectorate and the proclamations of the High Commissioner made thereunder imply the duty of obedience on the part of Sekgome and other persons within the area of the Protectorate to a practically unlimited extent. . . .

Appeal dismissed.

STATHAM v. STATHAM AND HIS HIGHNESS THE
GAEKWAR OF BARODA.

PROBATE, DIVORCE AND ADMIRALTY DIVISION OF THE HIGH COURT OF
JUSTICE OF ENGLAND. 1911.
Law Reports [1912] P. 92.

These were two applications arising out of a husband's divorce petition. . . .

The second was a summons . . . by the co-respondent asking that he should be dismissed from the suit on the ground that he was an independent ruling prince. . . .

BARGRAVE DEANE J. In this case Mr. George Wellington Statham has filed a petition praying the Court to dissolve his marriage on the ground of the adultery of his wife, Beatrix Alice Statham, with his Highness Maharaja Gaekwar Sir Saraji Rao III of Baroda, who has been added as a co-respondent in the suit under s. 28 of the Divorce Act, 1857.

The first question which I have to determine is raised by summons on behalf of the co-respondent, in which the Court is asked to dismiss him from the suit on the ground that he is a reigning sovereign and by the rules of international law is not amenable to the jurisdiction of the Court. . . .

There is no doubt that an independent reigning sovereign cannot by the rules of international law be made against his will a party to proceedings in our Courts. He may choose to sue, and if so a counter-claim may be raised against him as plaintiff, but he cannot be made a defendant.

What then is the status of the Gaekwar of Baroda?

So far as I have been able to ascertain by my researches the princes of Baroda date their importance from the Mahratta Confederacy, which in the eighteenth century was a powerful body of confederated ruling chiefs in India. During the last thirty-two years of the eighteenth century the house of Baroda fell a prey to family feuds, and in 1800 the succession fell to a prince feeble in mind. Internal troubles arising, British troops were sent in defense of the hereditary ruler against all claimants, and in 1802 a treaty was signed by which the independence of the reigning prince of all except the British Crown was assured, but which, on the other hand, secured his dependence on the British Crown. Several weak but troublesome princes succeeded in succession to the throne of Baroda, and in 1874

the then reigning Gaekwar was by order of the British Government brought to trial on a charge of attempting to poison the British resident at his court. The trial was conducted before a mixed commission of eminent British officers and natives of the highest rank. A unanimous verdict was not obtained, and in the result, the then Viceroy of India, Lord Northbrook, deposed the Gaekwar and appointed another member of the royal house of Baroda to reign in his place.

In October, 1911, an action was brought in the King's Bench Division of the High Court in England by one Ernest Emmanuel against the present reigning Gaekwar, and Lush J., upon hearing counsel for both sides and having obtained a certificate from the India Office as to the status of the Gaekwar of Baroda, ordered that the writ in the action be set aside and all proceedings stayed on the ground that the defendant was an independent sovereign and not a subject of His Majesty the King. The certificate from the India Office is as follows:—

"India Office Certificate.

"The Gaekwar of Baroda has been recognized by the Government of India as a ruling chief governing his own territories under the suzerainty of His Majesty. He is treated as falling within the class referred to in the Interpretation Act, 1889, section 18, sub-sec. 5, as that of native princes or chiefs under the suzerainty of His Majesty exercised through the Governor-General of India. The British Government does not regard or treat his Highness' territory as being part of British India or His Majesty's domain, and it does not regard or treat him or his subjects as subjects of His Majesty.

"But though his Highness is thus not independent, he exercises as ruler of his State various attributes of sovereignty, including internal sovereignty, which is not derived from British law, but is inherent in the ruling chief of Baroda, subject, however, to the Suzerainty of His Majesty the King of England and to the exercise by the Government of India of such of the rights and powers of territorial sovereignty as have by treaty, usage, or otherwise passed to and are exercised by the suzerain, such as, for instance, the exercise of jurisdiction over Europeans and Americans in Baroda, of interference to settle disputes as to succession to the State or to put a stop to gross misrule in the State, or to regulate armaments and the strength of the military forces, &c."

What is the meaning of the word "suzerainty" and what are

its essentials? Sir Courtney Ilbert in his work on the Government of India gives a digest of statutory enactments relating to India, and in a supplemental part to that digest are contained definitions of expressions in the digest. He adopts the interpretations given in the Interpretation Act, 1889, and the Indian General Clauses Act, 1897, and in a note says the expression "suzerainty" is substituted by the Interpretation Act for the older expression "alliance" as indicating more accurately the relation between the rulers of these States and the British Crown as the paramount authority throughout India.

Thus "suzerainty" is a term applied to certain international relations between two sovereign States whereby one, whilst retaining a more or less limited sovereignty, acknowledges the supremacy of the other. Such a relation may be either in the nature of a fief, or conventional, i. e., by some treaty of peace or alliance in contrast with the fief, which is a sovereignty granted by a lord paramount over some defined territory accompanied with an express grant of jurisdiction.

Grotius (*De Jure Belli ac Pacis*) says unequal leagues are made not only between the conqueror and the conquered, but also between peoples of unequal power, even such as never were at war with one another. Grotius, Pufendorf, and Vattel agree that in unequal alliance the inferior power remains a sovereign State. Its subjects or citizens own allegiance only to their own sovereign. Over their disputes and internal dissensions the suzerain power as such has no jurisdiction. In short, the weaker power may exercise the rights of sovereignty so long as by so doing no detriment is caused to the interests or influence of the suzerain power. It follows that the inferior power must in all alliances with other States be controlled by its suzerain. Vattel says a weak State which in order to provide for its safety places itself under the protection of a more powerful one and engages to perform in return several offices equivalent to that protection, without, however, divesting itself of the right of government and sovereignty, does not cease to rank among the sovereigns who acknowledge no other law than the law of nations.

In my opinion this aptly states the true status of the present Gaekwar of Baroda and is consistent with the status of that sovereign prince as defined by the certificate from the India Office, and it follows that his Highness by international law is not capable of being a co-respondent in a suit for dissolution

of marriage in the High Court in England, and his name must be struck out as a co-respondent. . . .

NOTE.—In *Worcester v. Georgia* (1836), 6 Peters, 515, 561, Chief Justice Marshall said:

The settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right of self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state." At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.

Protectorates differ widely in the extent of the authority of the protecting state. In some it is a power held in reserve to be used only as to certain subjects or on certain definite occasions. Such are the relations between the United States and Cuba. For the treaty of 1903, see Malloy, *Treaties and Conventions*, I. 362. In others, as in the case of the protectorate established by France over Tunis in 1883, the result is little short of annexation. The treaty of 1903 between the United States and Panama provides: "The United States guarantees and will maintain the independence of the Republic of Panama." Outside the Canal Zone however the United States exercises no functions of government. For the treaty of February 8, 1907 between the United States and the Dominican Republic, whereby the former acquired control of Dominican finances and such police supervision as would enable it to discharge its duties, see Malloy, I. 148. For the treaty giving the United States control over the finances of Haiti and certain powers in connection with the police and sanitary administration of the country, see 39 *U. S. Statutes-at-Large*, 1654. By the treaty of Fez of March 30, 1912, the Sultan of Morocco accepted a French protectorate. The Spanish Zone in Morocco is governed by Spain in accordance with the treaty of November 27, 1912 between France and Spain. In India there are more than six hundred native states which are under British protection, but are not an integral part of British dominions and whose rulers are known as the protected princes. While they are almost independent in the regulation of their internal affairs, they have no international status. See Sirdar Gurdial Singh v. The Rajah of Faridkote [1894] A. C. 670; Lee-Warner, *The Protected Princes of India*; Tupper, *Our Indian Protectorate*; Westlake, *Collected Papers*, 194. The anomalous situation of Egypt prior to the outbreak of the

Great War was terminated on December 7, 1914, when the following announcement was made:

His Britannic Majesty's Principal Secretary of State for Foreign Affairs gives notice that, in view of the state of war arising out of the action of Turkey, Egypt is placed under the protection of His Majesty, and will henceforth constitute a British Protectorate. The suzerainty of Turkey over Egypt is thus terminated, and His Majesty's Government will adopt all measures necessary for the defence of Egypt and the protection of its inhabitants and interests. The King has been pleased to approve the appointment of Lieutenant-Colonel Sir Arthur H. McMahon to be His Majesty's High Commissioner for Egypt.

On December 18, 1914, the British Government made this further announcement:

In view of the action of His Highness Abbas Hilmi Pacha, lately Khedive of Egypt, who has adhered to the King's enemies, His Majesty's Government have seen fit to depose him from the Khedivate, and that high dignity has been offered, with the title of Sultan of Egypt, to His Highness Prince Hussein Kamel Pacha, eldest living Prince of the family of Mehmet Ali, and has been accepted by him.

The protectorate thus established was terminated in 1922 by the granting of independence to Egypt, but the rights retained therein by Great Britain still place Egypt in the category of protected states. In order to give the new state of Poland an unimpeded outlet to the sea, provision was made in the Treaty of Versailles that the port of Danzig and certain adjacent territory, amounting in all to about seven hundred square miles, should form the Free State of Danzig, which was placed under the protection of the League of Nations by whom a High Commissioner is appointed. For further discussion of the international position of protectorates see *The Ionian Ships* (1855), 2 Spinks, *Ecc. & Adm.* 212; *The Charkieh* (1873), L. R. 4 Ad. & Ecc. 59; *Abd-ul-Messih v. Farra* (1887), 13 A. C. 431; *United States v. Assia* (1902), 118 Fed. 915; Sir Malcolm McIlwraith, "The Declaration of a Protectorate in Egypt and its Legal Effects", *Journal of the Society of Comparative Legislation*, XVII, 238; Burge, *Commentaries on Colonial and Foreign Laws*, new ed. 4 vols.; Engelhardt, *Les Protectorats Anciens et Modernes*; Bonfils (Fauchille), sec. 176; Moore, *Digest*, I, 27.

The Covenant of the League of Nations provides that states and territories which in consequence of the Great War had ceased to belong to the states formerly governing them and which were "not able to stand by themselves under the strenuous conditions of the modern world" shall be placed under the control of certain "advanced" states selected by the League. Such states are known as mandatories. They exercise such authority as the League may commit to them and are responsible to the League. In the choice of

mandatories for the states erected in Turkish territories, it was declared that the wishes of the populations concerned should be the principal consideration. By this system the League of Nations assumes a collective responsibility for the well-being of those regions which are placed under the control of its agents. Mandates have thus far been established as follows: Palestine and Mesopotamia to Great Britain; Syria to France; German East Africa to Great Britain and Belgium; German Southwest Africa to the Union of South Africa; Togoland to Great Britain and France; The German islands in the Pacific north of the equator to Japan; German Samoa to New Zealand; the other German islands in the Pacific south of the equator to Australia. The request of the Allies that the United States should accept a mandate for Armenia was rejected by the Senate.

SECTION 3. BELLIGERENT OR INSURGENT COMMUNITIES.

THE THREE FRIENDS.

SUPREME COURT OF THE UNITED STATES. 1897.
166 U. S. 1.

Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

[The steamer *Three Friends* which was fitted out on the seventh of May, 1896, in the St. John's River, Florida, with supplies, arms, and munitions intended for the service of the Cuban insurgents then in rebellion against the King of Spain, was seized by the collector of customs and libelled on behalf of the United States for violation of section 5283 of the Revised Statutes, the material portion of which provided for the forfeiture of any vessel and its equipment which should be fitted out in the United States for the purpose of waging hostilities in "the service of any foreign prince or state, or of any colony, district, or people." The owners of the vessel filed exceptions to the libel on the ground that it did not show any intent that the vessel should be employed "in the service of a foreign prince, or state, or of a colony, district or people with whom the United States are at peace," or of "any body politic recognized by or known to the United States as a body politic." These exceptions having been sustained, an appeal was taken by the United States to the Circuit Court of Appeals from

which the case was brought on a writ of certiorari to this court.]

MR. CHIEF JUSTICE FULLER . . . delivered the opinion of the court. . . .

By referring to section three of the act of June 5, 1794, section one of the act of 1817, and section three of the act of 1818. . . . it will be seen that the words "or of any colony, district, or people" were inserted in the original law by the act of 1817, carried forward by the act of 1818, and so into section 5283.

The immediate occasion of the passage of the act of March 3, 1817, appears to have been a communication, under date of December 20, 1816, from the Portuguese minister to Mr. Monroe, then Secretary of State, informing him of the fitting out of privateers at Baltimore to act against Portugal, in case it should turn out that the Government was at war with the "self-styled Government of Buenos Ayres," and soliciting "the proposition to Congress of such provisions of law as will prevent such attempts for the future." On December 26, 1816, President Madison sent a special message to Congress, in which he referred to the inefficacy of existing laws "to prevent violations of the obligations of the United States as a nation at peace towards belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States," and, "with a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States," recommended further legislative provisions. This message was transmitted to the minister December 27, and he was promptly officially informed of the passage of the act in the succeeding month of March. *Geneva Arbitration, Case of the United States*, 138. In Mr. Dana's elaborate note to § 439 of his edition of Wheaton, it is said that the words "colony, district, or people" were inserted on the suggestion of the Spanish minister that the South American provinces in revolt and not recognized as independent might not be included in the word "state." Under the circumstances this act was entitled as "to preserve the neutral relations of the United States," while the title of the act of 1794 described it as "in addition" to the Crimes Act of April 30, 1790, 1 Stat. 112, c. 9, and the act of 1818 was entitled in the same way. But there is nothing in all this to indicate that the words

"colony, district, or people" had reference solely to communities whose belligerency had been recognized, and the history of the times, an interesting review of which has been furnished us by the industry of counsel, does not sustain the view that insurgent districts or bodies, unrecognized as belligerents, were not intended to be embraced. On the contrary, the reasonable conclusion is that the insertion of the words "district or people" should be attributed to the intention to include such bodies, as, for instance, the so-called Oriental Republic of Artigas, and the Governments of Pétion and Christophe, whose attitude had been passed on by the courts of New York more than a year before in *Gelston v. Hoyt*, 13 Johns. 141, 561, which was then pending in this court on writ of error. There was no reason why they should not have been included, and it is to the extended enumeration as covering revolutionary bodies laying claim to rights of sovereignty, whether recognized or unrecognized, that Chief Justice Marshall manifestly referred in saying, in *The Gran Para*, 7 Wheat. 471, 489, that the act of 1817 "adapts the previous laws to the actual situation of the world." At all events, Congress imposed no limitation on the words "colony, district, or people," by requiring political recognition.

Of course a political community whose independence has been recognized is a "state" under the act; and, if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been, recognized, is also embraced by that term, then the words "colony, district, or people," instead of being limited to a political community which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country, in the effort to achieve independence, although recognition of belligerency has not been accorded.

And as agreeably to the principles of international law and the reason of the thing, the recognition of belligerency, while not conferring all the rights of an independent state, concedes to the Government recognized the rights, and imposes upon it the obligations, of an independent state in matters relating to the war being waged, no adequate ground is perceived for holding that acts in aid of such a Government are not in aid of a state in the sense of the statute. . . .

Even if the word "state" as previously employed admitted of

a less liberal signification, why should the meaning of the words "colony, district, or people" be confined only to parties recognized as belligerent? Neither of these words is used as equivalent to the word "state," for they were added to enlarge the scope of a statute which already contained that word. The statute does not say *foreign* colony, district, or people, nor was it necessary, for the reference is to that which is part of the dominion of a foreign prince or state, though acting in hostility to such prince or state. Nor are the words apt if confined to a belligerent. As argued by counsel for the Government, an insurgent colony under the act is the same before as after the recognition of belligerency, as shown by the instance of the colonies of Buenos Ayres and Paraguay, the belligerency of one having been recognized but not of the other, while the statute was plainly applicable to both. Nor is district an appropriate designation of a recognized power *de facto*, since such a power would represent not the territory actually held but the territory covered by the claim of sovereignty. And the word "people," when not used as the equivalent of state or nation, must apply to a body of persons less than a state or nation, and this meaning would be satisfied by considering it as applicable to any consolidated political body.

In *United States v. Quincy*, 6 Pet. 445, 467, an indictment under the third section of the act of 1818, the court disposed of the following, among other points, thus: "The last instruction or opinion asked on the part of the defendant was: That according to the evidence in the cause, the United Provinces of Rio de la Plata is, and was at the time of the offence alleged in the indictment, acknowledged by the United States, and thus was a 'state' and not a 'people' within the meaning of the act of Congress under which the defendant is indicted; the word 'people' in that act being intended to describe communities under an existing government not recognized by the United States; and that the indictment therefore cannot be supported on this evidence.

"The indictment charges that the defendant was concerned in fitting out the Bolivar with intent that she should be employed in the service of a foreign 'people;' that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence, that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation by the Executive Department of the Government of the United States, before the

year 1827. And therefore it is argued that the word 'people' is not properly applicable to that nation or power.

"The objection is one purely technical, and we think not well founded. The word 'people,' as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of Congress to a foreign power. The words are, 'in the service of any foreign prince or state, or of any colony, district, or people.' The application of the word 'people' is rendered sufficiently certain by what follows under the *videlicet*; 'that is to say, the United Provinces of Rio de la Plata.' This particularizes that which by the word 'people' is left too general. The descriptions are no way repugnant or inconsistent with each other, and may well stand together. That which comes under the *videlicet*, only serves to explain what is doubtful and obscure in the word 'people.' "

All that was decided was that any obscurity in the word "people" as applied to a recognized government was cured by the *videlicet*.

Nesbitt v. Lushington, 4 T. R. 783, was an action on a policy of insurance in the usual form, and among the perils insured against were "pirates, rovers, thieves," and "arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever." The vessel with a cargo of corn was driven into a port and was seized by a mob who assumed the government of her and forced the captain to sell the corn at a low price. It was ruled that this was a loss by pirates, and the maxim *noscitur a sociis* was applied by Lord Kenyon and Mr. Justice Buller. Mr. Justice Buller said: "'People' means 'the supreme power;' 'the power of the country,' whatever it may be. This appears clear from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of 'pirates, rogues, thieves;' then having stated all the individual persons, against whose acts they engage, they mention other risks, those occasioned by the acts of 'kings, princes, and people of what nation, condition, or quality soever.' Those words therefore must apply to 'nations' in their collective capacity."

As remarked in the brief of Messrs. Richard H. Dana, Jr., and Horace Gray, Jr., filed by Mr. Cushing in *Mauran v. Insurance Co.*, 6 Wall. 1, the words were "doubtless originally inserted

with the view of enumerating all possible forms of government, monarchical, aristocratical, and democratic.”

The British Foreign Enlistment Act, 59 Geo. III. c. 69, was bottomed on the act of 1818, and the seventh section . . . corresponded to the third section of that act. Its terms were, however, considerably broader and left less to construction. But we think the words “colony, district, or people” must be treated as equally comprehensive in their bearing here.

In the case of *The Salvador*, L. R. 3 P. C. 218, the *Salvador* had been seized under warrant of the governor of the Bahama Islands and proceeded against in the Vice-Admiralty Court there for breach of that section, and was, upon the hearing of the cause, ordered to be restored, the court not being satisfied that the vessel was engaged, within the meaning of the section, in aiding parties in insurrection against a foreign government, as such parties did not assume to exercise the powers of government over any portion of the territory of such government. This decision was overruled on appeal by the Judicial Committee of the Privy Council, and Lord Cairns, delivering the opinion, said: “It is to be observed that this part of the section is in the alternative. The ship may be employed in the service of a Foreign Prince, State, or Potentate, or Foreign State, Colony, Province, or part of any Province or People; that is to say, if you find any consolidated body in the Foreign State, whether it be the Potentate, who has the absolute dominion, or the Government, or a part of the Province, or of the People, or the whole of the Province or the People acting for themselves, that is sufficient. But by way of alternative it is suggested that there may be a case where, although you cannot say that the Province, or the People, or a part of the Province or People are employing the ship, there yet may be some person or persons who may be exercising, or assuming to exercise, powers of Government in the Foreign Colony or State, drawing the whole of the material aid for the hostile proceedings from abroad; and, therefore, by way of alternative, it is stated to be sufficient, if you find the ship prepared or acting in the service of ‘any person or persons exercising, or assuming to exercise, any powers of Government in or over any Foreign State, Colony, Province or part of any Province or People;’ but that alternative need not be resorted to, if you find the ship is fitted out and armed for the purpose of being ‘employed in the service of any Foreign State or People, or part of any Province or People.’ . . .

"It may be (it is not necessary to decide whether it is or not) that you could not state who were the person or persons, or that there were any person or persons exercising, or assuming to exercise, powers of Government in Cuba, in opposition to the Spanish authorities. That may be so: their Lordships express no opinion upon that subject, but they will assume that there might be a difficulty in bringing the case within that second alternative of the section, but their Lordships are clearly of opinion that there is no difficulty in bringing the case under the first alternative of the section, because their Lordships find these propositions established beyond all doubt,—there was an insurrection in the island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; these insurgents, beyond all doubt, formed part of the Province or People of Cuba; and beyond all doubt the ship in question was to be employed, and was employed, in connection with and in the service of this body of insurgents."

We regard these observations as entirely apposite, and while the word "people" may mean the entire body of the inhabitants of a state; or the state or nation collectively in its political capacity; or the ruling power of the country; its meaning in this branch of the section, taken in connection with the words "colony" and "district," covers in our judgment any insurgent or insurrectionary "body of people acting together, undertaking and conducting hostilities," although its belligerency has not been recognized. Nor is this view otherwise than confirmed by the use made of the same words in the succeeding part of the sentence, for they are there employed in another connection, that is, in relation to the cruising, or the commission of hostilities, "against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace;" and, as thus used, are affected by obviously different considerations. If the necessity or recognition in respect of the objects of hostilities, by sea or land, were conceded, that would not involve the concession of such necessity in respect of those for whose service the vessel is fitted out.

Any other conclusion rests on the unreasonable assumption that the act is to remain ineffectual unless the Government incurs the restraints and liabilities incident to an acknowledgment of belligerency. On the one hand, pecuniary demands, reprisals, or even war, may be the consequence of failure in the perform-

ance of obligations toward a friendly power, while on the other, the recognition of belligerency involves the rights of blockade, visitation, search, and seizure of contraband articles on the high seas, and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare.

No intention to circumscribe the means of avoiding the one by imposing as a condition the acceptance of the contingencies of the other can be imputed.

Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing power; and in the instance of maritime operations, recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates. The *Ambrose Light*, 25 Fed. Rep. 408; 3 Whart. Dig. Int. Law, § 381; and authorities cited.

But it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed.

The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred.

On June 12, 1895, a formal proclamation was issued by the President and countersigned by the Secretary of State, informing the people of the United States that the island of Cuba was "the seat of serious civil disturbances accompanied by armed resistance to the authority of the established government of Spain, a power with which the United States are and desire to remain on terms of peace and amity." . . .

July 27, 1896, a further proclamation was promulgated, and in the annual message of December 7, 1896, the President called attention to the fact that "the insurrection in Cuba still continues with all its perplexities," and gave an extended review of the situation.

We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity

although acknowledgment of the insurgents as belligerents by the political department has not taken place; and it cannot be doubted that, this being so, the act in question is applicable.

We see no justification for importing into section 5283 words which it does not contain and which would make its operation depend upon the recognition of belligerency; and while the libel might have been drawn with somewhat greater precision, we are of opinion that it should not have been dismissed. . . .

The decree must be reversed. . . .

MR. JUSTICE HARLAN dissenting. . . .

NOTE.—Belligerency has long been recognized as a definite status in international law which confers all the rights of an independent government so far as the waging of war is concerned. It is discussed in *Rose v. Himeley* (1808), 4 Cranch, 241, *United States v. Palmer* (1818), 3 Wheaton, 610; *The Divina Pastora* (1819), 4 Ib. 52; *United States v. Klinton* (1820), 5 Ib. 144; *The Santissima Trinidad* (1822), 7 Ib. 283, 337; *The Prize Cases* (1863), 2 Black, 635; *Williams v. Bruffy* (1877), 96 U. S. 176; *Ford v. Surget* (1879), 97 U. S. 594; *Dow v. Johnson* (1880), 100 U. S. 158, 164; *United States v. Pacific Railroad* (1887), 120 U. S. 227, 233; *Underhill v. Hernandez* (1897), 168 U. S. 250; *Baldy v. Hunter* (1898), 171 U. S. 388; *Oakes v. United States* (1899), 174 U. S. 778; *The Amy Warwick* (1862), 2 Sprague, 123. See also Moore, *Digest*, I, 164, and Wheaton (Dana), 34 note 15., This note by Richard Henry Dana is the classic statement of the law of belligerency.

The recognition of the belligerency of an insurgent community not only accords rights to the insurgents but imposes duties and restrictions upon the recognizing state. It may no longer treat the acts of war of the insurgents as acts without political authority and it is under obligation to observe strict neutrality in the contest between the insurgents and the parent state. When the United States accorded to the Confederate States the rights of a belligerent, the two became hostile powers and their inhabitants public enemies, *Stovall, Administrator v. United States* (1891), 26 Ct. Cl. 226, 240. Hence trade by citizens of the loyal States having no other object than to rescue their property in the South was trading with the enemy and was illegal, *Montgomery v. United States* (1873), 15 Wallace, 395; *Cutner v. United States* (1875), 17 Ib. 517; *United States v. Lapène* (1874), 17 Ib. 601; *Dillon v. United States* (1870), 5 Ct. Cl. 586. The recognition of belligerency on the part of neutral states is a recognition of a war status only and accords no rights not directly associated with the conduct of the war, *Latham v. Clark* (1870), 25 Ark. 574; *Shortridge v. Mason* (1867), 22 Fed. Cases, No. 12812. Although the Confederate States were recognized by President Lincoln as belligerents, it was held that such recognition did not imply any right on their part to establish prize courts for the condemnation of vessels or cargoes belonging to citizens of the loyal States, and the decisions of Confederate prize courts in cases of that kind were dis-

regarded, *The Lilla* (1862), 2 Sprague, 177, 187. If the insurgent or *de facto* government succeeds in establishing itself, its acts from the beginning of its existence are regarded as those of an independent government, *M'Ilvaine v. Coxe* (1808), 4 Cranch, 209; *United States v. Rice* (1819), 4 Wheaton, 246; *Underhill v. Hernandez* (1897), 168 U. S. 250; *Murray v. Vanderbilt* (1863), 39 Barbour (N. Y.) 140; *State of Yucatan v. Argumedo* (1915), 92 N. Y. Misc. 547; *Molina v. Comision Reguladora del Mercado de Henequen* (1918), 92 N. J. Law 38.

On the recognition of the belligerency of the Confederate States see Bancroft, *Life of W. H. Seward*; Nicolay and Hay, *Abraham Lincoln: A History*; Montague Bernard, *Historical Account of the Neutrality of Great Britain during the American Civil War*; Callahan, *Diplomatic History of the Southern Confederacy*; Hyde, I, 79; Moore, *Digest*, 184. On the recognition of Cuban belligerency, see Beale, "The Recognition of Cuban Belligerency," *Harvard Law Review*, IX, 406. The general principles of the recognition of belligerency are discussed in Cobbett, *Cases and Opinions*, I, 63; Bonfils (Fauchille), sec. 1045; Hyde, I, 77; Moore, *Digest*, I, 164, 248.

Not every petty contest by irresponsible insurgents can be allowed to disturb the normal relations of states, as is inevitably the case when the insurgents are recognized as belligerents. It was long insisted that any body of insurgents who were not recognized as belligerents should be treated as criminals. If their operations took place on the high seas they were classed as pirates. The obvious injustice of this was so great that there has come to be acknowledged a status midway between peace and belligerency which is known as insurgency. That the recognition of belligerency did not apply to every minor act of insurrection was apparently admitted in *The Nueva Anna and Liebra* (1821), 6 Wheaton, 193. The Three Friends is the chief decision dealing with the distinction between belligerency and insurgency. The Neutrality Act of the United States and the British Foreign Enlistment Act, both of which were enacted for the purpose of assuring neutrality in a war between recognized belligerents, have been held to apply to insurgents, *Wiborg v. United States* (1896), 163 U. S. 632; *The Salvador* (1870), L. R. 3 P. C. 218. See also *The Ambrose Light* (1885), 25 Fed. 408 (a scholarly opinion); *The Itata* (1893), 56 Fed. 505; Moore, *Digest*, I, 242; II, 1076; George G. Wilson, "Insurgency and International Maritime Law," in *Am Jour. Int. Law*, I, 46; *International Law Situations, 1901*, 108; *1902*, 57; *1904*, 26; *1907*, 127; *1912*, 9. These discussions at the Naval War College, the first of which was conducted by Professor John Bassett Moore, the others by Professor George G. Wilson, are unusually valuable contributions to a branch of international law which is still in process of formation. The status of the Cuban insurgents in 1895 is discussed in *21 Opinions of the Attorney-General*, 267.

CHAPTER III.

THE CONTINUING PERSONALITY OF STATES.

THE SAPPHIRE.

SUPREME COURT OF THE UNITED STATES. 1871.
11 Wallace, 164.

Appeal from the Circuit Court of the United States for the District of California.

[There having been a collision between the American ship *Sapphire* and the French transport *Euryale*, in the harbor of San Francisco, a libel was filed against the *Sapphire* in the name of the Emperor Napoleon III, then Emperor of the French, as owner of the *Euryale*. The decree of the District Court in favor of the libellant was affirmed by the Circuit Court, from which an appeal was taken in July, 1869. In September, 1870, the Emperor Napoleon was deposed. The case was argued before the Supreme Court in February, 1871.]

MR. JUSTICE BRADLEY delivered the opinion of the court.

The first question raised is as to the right of the French Emperor to sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third circuit by Justice Washington and Judge Peters in 1810. *King of Spain v. Oliver*, 2 Washington's Circuit Court, 431. The Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and *foreign States*, citizens, or subjects, without reference to the subject-matter of the controversy. Our own government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late civil war. Twelve or more of such suits

are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit. *King of Spain v. Hullett*, 1 Dow. & Clarke, 169; S. C., 1 Clarke & Finnely, 333; S. C., 2 Bligh, N. S., 31; *Emperor of Brazil*, 6 Adolphus & Ellis, 801; *Queen of Portugal*, 7 Clarke & Finnely, 466; *King of Spain*, 4 Russell, 225; *Emperor of Austria*, 3 De Gex, Fisher & Jones, 174; *King of Greece*, 6 Dowling's Practice Cases, 12; S. C., 1 Jurist, 944; *United States*, Law Reports, 2 Equity Cases, 659; Ditto, *Ib.* 2 Chancery Appeals, 582; *Duke of Brunswick v. King of Hanover*, 6 Beavan, 1; S. C., 2 House of Lords Cases, 1; *De Haber v. Queen of Portugal*, 17 Q. B. 169; also 2 Phillimore's International Law, part vi, chap. i; 1 Daniel's Chancery Practice, chap. ii, § ii.

The next question is, whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the *Euryale*, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such inures to his successor in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the real and substantial ownership of the *Euryale* has occurred by the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the French nation.

If a special case should arise in which it could be shown that

injustice to the other party would ensue from a continuance of the proceedings after the death or deposition of a sovereign, the court, in the exercise of its discretionary power, would take such order as the exigency might require to prevent such a result. . . . *Decree of the Circuit Court Reversed.* . . .

KEITH v. CLARK.

SUPREME COURT OF THE UNITED STATES. 1879.
97 U. S. 454.

Error to the Supreme Court of the State of Tennessee.

[The State of Tennessee organized in 1838 the Bank of Tennessee and agreed by a clause in its charter to receive its circulating notes in payment of taxes, but by a constitutional amendment adopted in 1865 it declared the notes issued by the bank during the Civil War null and void and forbade their acceptance for taxes. In accordance with this amendment the defendant, a collector of taxes, had refused such notes when tendered by the plaintiff, who now sues to recover the money which he had later paid under protest.]

MR. JUSTICE MILLER delivered the opinion of the court. . . .

The second proposition . . . is, as we understand it, that each of the eleven States who passed ordinances of secession and joined the so-called Confederate States so far succeeded in their attempt to separate themselves from the Federal government, that during the period in which rebellion maintained its organization those States were in fact no longer a part of the Union, or if so, the individual States, by reason of their rebellious attitude, were mere usurping powers, all of whose acts of legislation or administration are void, except as they are ratified by positive laws enacted since the restoration, or are recognized as valid on the principles of comity or sufferance.

We cannot agree to this doctrine. It is opposed by the inherent powers which attach to every organized political society possessed of the right of self-government; it is opposed to the recognized principles of public international law: and it is opposed to the well-considered decisions of this court.

"Nations or States," says Vattel, "are bodies politic, societies of men united together for the promotion of their mutual safety and advantage by the joint efforts of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights." Law of Nations, sect. 1.

Cicero and subsequent public jurists define a State to be a body political or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength. Wheaton, International Law, sect. 17. Such a body or society, when once organized as a State by an established government, must remain so until it is destroyed. This may be done by disintegration of its parts, by its absorption into and identification with some other State or nation, or by the absolute and total dissolution of the ties which bind the society together. We know of no other way in which it can cease to be a State. No change of its internal polity, no modification of its organization or system of government, nor any change in its external relations short of entire absorption in another State, can deprive it of existence or destroy its identity. *Id.*, sect. 22.

Let us illustrate this by two remarkable periods in the history of England and France.

After the revolution in England, which dethroned and decapitated Charles I., and installed Cromwell as supreme, whom his successors called a usurper; after the name of the government was changed from the Kingdom of England to the Commonwealth of England; and when, after all this, the son of the beheaded monarch came to his own, treaties made in the interregnum were held valid,—the judgments of the courts were respected, and the obligations assumed by the government were never disputed.

So of France. Her bloody revolution, which came near dissolving the bonds of society itself, her revolutionary directory, her consul, her Emperor Napoleon, and all their official acts, have been recognized by the nation, by the other nations of Europe, and by the legitimate monarchy when restored, as the acts of France, and binding on her people.

The political society which in 1796 became a State of the Union, by the name of the State of Tennessee, is the same which is now represented as one of those States in the Congress of the

United States. Not only is it the same body politic now, but it has always been the same. There has been perpetual succession and perpetual identity. There has from that time always been a State of Tennessee, and the same State of Tennessee. Its executive, its legislative, its judicial departments have continued without interruption and in regular order. It has changed, modified, and reconstructed its organic law, or State Constitution, more than once. It has done this before the rebellion, during the rebellion, and since the rebellion. And it was always done by the collective authority and in the name of the same body of people constituting the political society known as the State of Tennessee.

This political body has not only been all this time a State, and the same State, but it has always been one of the United States,—a State of the Union. Under the Constitution of the United States, by virtue of which Tennessee was born into the family of States, she had no lawful power to depart from that Union. The effort which she made to do so, if it had been successful, would have been so in spite of the Constitution, by reason of that force which in many other instances establishes for itself a status, which must be recognized as a fact, without reference to any question of right, and which in this case would have been, to the extent of its success, a destruction of that Constitution. Failing to do this, the State remained a State of the Union. She never escaped the obligations of that Constitution, though for a while she may have evaded their enforcement. . . .

If the State of Tennessee has through all these transactions been the same State, and has been also a State of the Union, and subject to the obligations of the Constitution of the Union, it would seem to follow that the contract which she made in 1838 to take for her taxes all the issues of the bank of her own creation, and of which she was sole stockholder and owner, was a contract which bound her during the rebellion and which the Constitution protected then and now, as well as before. Mr. Wheaton says: "As to public debts,—whether due to or from the State,—a mere change in the form of the government, or in the person of the ruler, does not affect their obligation. The essential power of the State, that which constitutes it an independent community, remains the same: its accidental form only is changed. The debts being contracted in the name of the State, by its authorized agents, for its public use, the nation continues liable for them, notwithstanding the change in its internal con-

stitution. The new government succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations, of the former government." International Law, sect. 30. And the citations which he gives from Grotius and Puffendorf sustain him fully.

We are gratified to know that the Supreme Court of the State of Tennessee has twice affirmed the principles just laid down in reference to the class of bank-notes now in question. In a suit brought by the State of Tennessee against this very bank of Tennessee, to wind up its affairs and distribute its assets, that court, in April, 1875, decreed, among other things, "that the acts by which it was attempted to declare the State independent, and to dissolve her connection with the Union, had no effect in changing the character of the bank, but that it had the same powers, after as before those acts, to carry on a legitimate business, and that the receiving of deposits was a part of such legitimate business." "That the notes of the bank issued since May 6, 1861, held by Atchison and Duncan, and set out in their answer, are legal and subsisting debts of the bank, entitled to payment at their face value, and to the same priority of payment out of the assets of the bank as the notes issued before May 6, 1861."

At a further hearing of the same case, in January, 1877, that court reaffirmed the same doctrine, and also held that the notes were not subject to the Statute of Limitations, and were not bound by it. *State of Tennessee v. Bank of Tennessee*, not reported. This decision was in direct conflict with schedule 6 of the constitutional amendment of 1865, which declared all issues of the bank after May 6, 1861, void, and it necessarily held that the schedule was itself void as a violation of the Federal Constitution. . . .

The judgment of the Supreme Court of Tennessee will, therefore, be reversed. . . .

MR. CHIEF JUSTICE WAITE, MR. JUSTICE BRADLEY, and MR. JUSTICE HARLAN dissented. . . .

NOTE.—The continuity of the identity of a state regardless of changes in its territory and form of government is a principle of cardinal importance in determining its international rights and liabilities. It is so well established that it is seldom questioned in any international controversy, but a few examples will demonstrate the necessity of its recognition. Since the establishment of the independence of the United States, its area has been trebled by the annexation of Florida, and the territory extending from the Mississippi to the Pacific coast as well as Porto Rico, Alaska, Hawaii and the Philippines, but it remains the same political entity. Since 1789 France has been in turn a kingdom,

a republic, an empire, a kingdom, a republic, an empire and again a republic, but throughout these changes it continues to be France, and it is bound by any engagements made in its behalf by any of the governmental agents which have been authorized from time to time to act for it. Perhaps the most striking example of a personality which has survived radical changes in both territory and government is the kingdom of Italy. By a series of annexations culminating in 1870, the kingdom of Sardinia, comprising the island of that name and the northwest corner of the Italian peninsula, succeeded in uniting with itself all the other states in Italy, which it organized into the kingdom of Italy with its seat at Rome. Although its territory was vastly increased, its name changed, a new government created and its capital established at a point outside of the original state, yet the kingdom of Italy regards itself as the same political entity as the kingdom of Sardinia and acknowledges itself bound by the treaties made by Sardinia. This however seems a somewhat forced identification, and some jurists of distinction, *e. g.* Holzendorff and Hall, think that the kingdom of Italy should be regarded as a new creation. The case is certainly much more extreme than that presented by the territorial growth of the United States and the governmental changes in France.

The continuing personality of the state regardless of changes in its territory or form of government is important chiefly in connection with the contracts of the state. When a government is established as the recognized government of a state, it may assert any right which accrued to the state under any preceding government whether *de facto* or *de jure*, *State of Yucatan v. Argumedo* (1915), 92 N. Y. Misc. 547. Territorial or governmental changes do not release it from its contracts or treaty obligations unless they make those obligations impossible of fulfillment or create a situation which could not have been in contemplation when they were entered into, *Republic of Peru v. Dreyfus* (1888), L. R. 38 Ch. D. 348. Likewise the substitution of one form of government for another does not affect the duty of the state as to its debts. When Brazil was changed from an empire to a republic in 1889, the new government immediately announced that the obligations contracted by the imperial government would not be questioned. In *Agency of American Car & Foundry Co., Limited, v. American Can Co.* (1919), 258 Fed. 363, 369, the question at issue being the power of an agent of the Kerensky Government to make an effective settlement of a contract entered into by the government of the Czar, the court said:

The principle of law is well established that the rights and liabilities of a state are not affected by a change in the form or the personnel of a government, no matter how that change may be effected. The obligations of a state, the debts due to and from it, are not affected by any transformation in the internal organization of its government.

If, however, the debts have been contracted with reference to a specific portion of its territory, the loss of that territory may in some

cases affect the obligation which was contracted on the assumption of its continued possession and enjoyment. As to such cases it is difficult to lay down general rules. Each must be judged on its own facts.

As to how far the acts of a *de facto* government are binding upon its successor, see *Republic of Peru v. Dreyfus* (1888), L. R. 38 Chancery Division, 348; *United States v. Prioleau* (1865), 35 L. J. Chan. Rep. N. S. 7; *United States v. McRae* (1869), L. R. 8 Eq. 69; *United States v. Home Insurance Co.* (1875), 22 Wallace, 99; *Williams v. Bruffy* (1877), 96 U. S. 176; *Coffee v. Groover* (1887), 123 U. S. 1; *Baldy v. Hunter* (1898), 171 U. S. 388; *MacLeod v. United States* (1913), 229 U. S. 416.

The preservation of the identity of the state's personality throughout changes in territory or government should be clearly distinguished from the question of state succession or the transmission of rights and obligations as concomitant with a transfer of jurisdiction. For further discussion of the principal of the continuity of state life, see *Rivier*, I, 62; *Cobbett, Cases and Opinions*, I, 78; *Moore, Digest*, I, 248.

CHAPTER IV.

STATE SUCCESSION.

UNITED STATES OF AMERICA v. PRIOLEAU.

COURT OF CHANCERY OF ENGLAND. 1865.
35 LAW JOURNAL, Chancery, N. S. 7.

[The government of the Confederate States owned certain cotton which it consigned to the defendant Prioleau and others, at Liverpool, authorizing them to sell it, and recoup themselves for certain charges out of the proceeds. Upon the downfall of the Confederacy the United States filed a bill praying to have the cotton, then in Liverpool, delivered up to it, and for an injunction and a receiver. The defendants proved a lien upon the cotton for £20,000.]

Wood, V. C.—There are one or two points which, I think, are tolerably clear in this case. The first point is with reference to the right of the United States of America, at this moment, to the cotton, subject to the agreement. I treat it first in that way. It has scarcely been disputed on the present argument, and could hardly be disputed at any further stage of the inquiry, that the right is clear and distinct, because the cotton in question is the admitted result of funds raised by a *de facto* government, exercising authority in what were called the Confederate States of America; that is to say, several of those States which, in union, formerly constituted the United States, and which now, in fact, constitute them; and that *de facto* government, exercising its powers over a considerable number of States (more than one would be quite enough), raises money—be it by voluntary contribution, or be it by taxation, is not of much importance. The defendant Prioleau, in cross-examination, admits that they exercised considerable power of taxation; and with those means, and claiming to exercise that authority, they obtained from several of the States of America funds, by

which they purchased this cotton for the use of the *de facto* government. That being so, and that *de facto* government being displaced, I apprehend it is quite clear that the United States of America (that is to say, the government which has been successful in displacing the *de facto* government, and whose authority was usurped or displaced, or whatever term you may choose to apply to it), the authority being restored, stand, in reference to this cotton, in the position of those who have acquired, on behalf of the citizens of the United States, a public property; because otherwise, as has been well said, there would be no body who could sue in respect of, or deal with property that has been raised, not by contribution of any one sovereign state (which might raise a question, owing to the peculiar constitution of the Union, if it had been raised in Virginia or Texas, or in any given State), but the cotton is the product of levies, voluntary or otherwise, on the members of the several States which have united themselves into the Confederate States of America, and which are now under the control of the present plaintiffs, and are represented, for all purposes, by the present plaintiffs. That being so, the right of the present plaintiffs to this cotton, subject to this agreement is, I think, clear, because the agreement is an agreement purporting to be made on behalf of the then *de facto* existing government, and not of any other persons. That case of The King of the Two Sicilies [1 Sim. N. S. 301] and the case of The King of Spain, [1 Dow. & Cl. 169], and other cases of the same kind, which it is not necessary to go through, show that whenever a government *de facto* has obtained the possession of property, as a government, and for the purposes of the government *de facto*, the government which displaces it succeeds to all the rights of the former government, and, among other things, succeeds to the property they have so acquired.

Now I come to the second head of the question, and I confess at this moment, as at present advised . . . I do not feel much doubt on the subject, namely, the question whether or not, taking this property, they must or must not take it subject to the agreement. It appears to me, at present, they must take it subject to the agreement. It is an agreement entered into by a *de facto* government, treating with persons who have a perfect right to deal with them. I apprehend if they had been American subjects they might do so. One of them, Prioleau, is not an American subject (at least I have no evidence that he is);

he is a naturalized British subject; he would have a perfect right to deal with a *de facto* government; and it cannot be compared with any one of those cases Mr. Gifford put, of persons taking the property of another with knowledge of the rights of that other. That is a species of argument that cannot be applied to international cases of this description, and for a very good reason; if so, there would be no possibility during the existence of a government *de facto* of any person dealing with that government in any part of the world. The Courts of every country recognize a government *de facto* to this extent, for the purpose of saying—you are established *de facto*, if you are carrying on the course of government, if you are allowed by those whom you affect to govern to levy taxes on them, and they pay those taxes, and contribution is made accordingly, or you are acquiring property, and are at war, having the rights of belligerents, not being treated as mere rebels by persons who say they are the authorized government of the country. Other nations can have nothing to do with that matter. They say we are bound to protect our subjects who treat with the existing government; and we must give to those subjects, in our country, every right which the government *de facto* can give to them, and must not allow the succeeding government to assert any right as against the contracts which have been entered into by the government *de facto*; but, as expressed by Lord Cranworth in the case referred to, they must succeed in every respect to the property as they find it, and subject to all the conditions and liabilities to which it is subject and by which they are bound. Otherwise, I do not see any answer to Mr. James' illustration, and I do not see why there should not have been a bill filed to have the Alabama delivered up; . . . because on the theory of the present plaintiffs, it was their property just as much as their cotton is now. If the case had been this (and it is the only case I can consider as making any difference, but that difference would be fatal to the plaintiffs' case in another point of view): if they had been a set of marauders, a set of robbers (as was said to be the case in the kingdom of Naples, truly or untruly), devastating the country, and acquiring property in that way, and then affecting to deal with your subjects in England, it would not be the United States, but the individuals who had been robbed and suffered, who could come as plaintiffs. That would be fatal to the claim of the United States as plaintiffs. The United States could only come to

claim this because it has been raised by public contribution; and although the United States, who are now the government *de facto* and *de jure*, claim it as public property, yet it would not be public property unless it was raised, as I have said, by exercising the rights of government, and not by means of mere robbery and violence.

I confess, therefore, I have so little doubt, that this agreement is one that would be binding on the plaintiffs, that I cannot act against these gentlemen without securing to them the reasonable benefit of this agreement; and I cannot put them under any terms which would exclude them from the reasonable benefit of what they are entitled to, and must be held entitled to, as I think, at the hearing of the cause. . . .

UNITED STATES OF AMERICA v. McRAE.

COURT OF CHANCERY OF ENGLAND. 1869.

Law Reports, 8 Eq. 69.

The bill in this case was filed by the United States of America, for the purpose of obtaining an account of all moneys and goods which came to the hands of the defendant, as agent, or otherwise, on behalf of "the pretended Confederate government during the late insurrection," and of his dealings therewith, and payment by the Defendant of the moneys which on taking such account might be in his hands, and a delivery over of the goods in his possession.

The bill stated the rebellion in 1861, and the establishment of a pretended government under the style of the Confederate States of America, which assumed the administration of public affairs there, and exercised such usurped authority during the rebellion and until the rebellion was put an end to. Such pretended government possessed themselves of divers moneys, goods and treasure, part of the public property of the plaintiffs; and other moneys and goods were from time to time paid and contributed to them by divers persons inhabitants of the United States, and owing allegiance to Plaintiffs, or were seized and acquired by the said pretended government in the exercise of their usurped authority, and all such moneys, and goods became part of the public property of the pretended government, or

were employed, or intended to be employed, for the purposes of the said pretended government, and in aid of the said rebellion. The pretended government and their agents sent to agents and other persons in England large amounts of money to be laid out in purchasing goods, or otherwise for the use of such pretended government, and also sent to England large quantities of goods to be sold, and the proceeds to be laid out in purchasing goods for the said pretended government. Then followed this statement (paragraph 4) :—

“The said pretended government and their agents at the time aforesaid sent large sums of money and large quantities of goods to the Defendant, Colin J. McRae, and the said Colin J. McRae sold a large part of the said goods and received the moneys from such sale, and at the dissolution of the said pretended government the said Defendant had in his possession or power large sums of money and large quantities of goods which had been so sent to him as aforesaid, or which had arisen from moneys and goods so sent to him as aforesaid.”

The bill, after stating the suppression of the rebellion, and the submission of the persons forming such pretended government to the authority of the United States government, alleged that “all the joint or public property of the persons who constituted the pretended Confederate government, including the said moneys and goods, have vested in Plaintiffs, and the so-called Confederate government does not, nor does any person on their behalf, now claim to be entitled to, or interested in, the said moneys and goods,” which “are now the absolute property of Plaintiffs, and ought to be paid and delivered to them.” To this bill, which was filed in June, 1866, the Defendant McRae pleaded that by an Act of Congress of the Plaintiffs, the United States of America, approved the 17th day of July, 1862, the property of all persons holding any office or agency under the government of the so-called Confederate States was liable to confiscation; that proceedings were actually pending in America for confiscation of his property there, on the ground of his having so acted as agent; that the Defendant could not answer the bill without subjecting his property to confiscation; and that the Plaintiffs could not have relief without waiving the right to confiscate. . . .

The Vice-Chancellor asked if the Plaintiffs were willing to have the account taken, as it would be taken, between the Confederate government, on the one hand; and the Defendant, as

agent of such government, on the other hand; and to pay what (if anything) might be found due from them on the footing of such account.

Sir Roundell Palmer [counsel for the United States] declined to accept the decree in any form which would recognise the authority of the belligerent states, or involve any payment to their agent.

SIR W. M. JAMES, V. C. . . . I have considered this case, and I propose to deal with it as if the Plaintiffs, instead of being a foreign state had been the Government of India, and as if the Defendant had been the agent of the persons who for several months had possession of the city of Lucknow and the surrounding territory of Oude, and assumed to exercise the rights of sovereignty there until their rebellion was finally suppressed by Lord Clyde. Upon the suppression of such a rebellion and the determination of such an usurpation very different rights in respect of the property seized and acquired during the rebellion and usurpation accrue to the legitimate government recovering its power and possessions. The moneys, goods, and treasure which were at the outbreak the public property of the plaintiffs, and which were seized by the rebels, still continued their moneys, goods, and treasure, their rights of property and rights of possession being in no-wise divested or defeated by the wrongful seizure of them. And if at the end of the rebellion any of such moneys, goods, or treasure, or the produce thereof capable of being identified or ear-marked, could be traced into the possession of any person, the rightful owners would be entitled to apply to the proper tribunal having jurisdiction over such person to award restitution. If such person were an accomplice, a *particeps criminis*, or had received the property with full notice of the title of the rightful owner, the latter would be entitled to an order for restitution *simpliciter*. If he had received it as an innocent factor, banker, or other agent, the right to restitution would be or might be of a more qualified or limited kind; it would be or might be subject to any claim or lien which in his character of innocent bailee without notice he might have. The rights of the owner and the rights of the holder would in that case depend on the general law of bailment as applicable to the special circumstances of the bailment. But with respect to the other moneys and goods paid or contributed to, or seized and acquired by, the pretended government in the exercise of

their usurped authority, the right of the restored government is of a very different character. It cannot be contended that such moneys or goods became by the mere fact of the voluntary contribution of accomplices, or by the spoliation of innocent persons, vested in right of possession or right of property in the lawful government. The moneys voluntarily contributed to the rebels could not, to use our legal phraseology, be considered as moneys had and received to the use of the lawful government, and the right of property and the right of possession in respect of the specific property taken by force from innocent persons would still remain in such persons. But there is a right incident to the power of sovereignty which is applicable to the case. I apprehend it to be the clear public universal law that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature or origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouses, forts, or arsenals, would, on the success of the new or restored power, vest *ipso facto* in such power; and it would have the right to call to account any fiscal or other agent, or any debtor or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government, the agent, debtor, or accountant having been the agent, debtor, or accountant of such persons in their character or pretended character of a government. But this right is the right of succession, is the right of representation, is a right not paramount, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights as if that authority had not been suppressed and displaced and was itself seeking to enforce it. Analogies, no doubt, are often misleading, but there is an analogy which, I think, in this case apt and not misleading. A person, say A., may happen to be the legal personal representative or assignee in bankruptcy of a wrongdoer who has tortiously acquired his property, and which property can be traced to the possession of the wrongdoer's general agent. In that state of things A. has a right to call the latter to account in respect of the property

so traced, and he has another and a very distinct right to call him to account generally in respect of his agency. In the first case he deals with him simply as the holder of stolen goods. In the second, he must, if he proceed at all, proceed on the privity of title, and must have his account taken on the footing of recognising and adopting the agency; and if he proceeds in this Court, according to the ordinary rules by which this Court takes accounts and administers equity as between principal and agent. It was on this ground, therefore, that I asked the counsel for the Plaintiffs, at the close of the case, whether they were prepared to submit to such an ordinary account—that is to say, to have the account taken as it would be taken between the so-called Confederate government on the one hand and the Defendant as the agent of such government on the other hand, and to pay what on the footing of such account should be found due from them if the result of the investigation should show a balance due to the accounting party. For very obvious reasons the Plaintiffs' counsel declined accepting such a decree as that. I can easily conceive the many public reasons which would preclude the Plaintiffs from giving anything like the faintest recognition of the public character or public functions of such agents of the rebellion or secession as the Defendant, who was the special agent of the Confederate loan. But they cannot in a Court of justice approbate and reprobate. They cannot claim from an agent of the Confederate government an account of his agency, and at the same time repudiate all privity of title with him and his former principals. This, to my mind, obvious result was as obviously present to the mind of the careful and experienced pleader by whom the bill was drawn; and reading the bill now by the light thrown upon it by these considerations, and by the refusal of the Plaintiffs to submit to such a mode of accounting as I have suggested, I am satisfied the bill is intentionally drawn so as to omit any claim founded on any right to an account derived from or through the Confederate government, and that it was intended to be, and was, based entirely on the paramount title of the Plaintiffs to those moneys and goods which were originally theirs, and in respect of which they could treat the possession of the Defendant as the possession of the agent of public plunderers, or to specific moneys and goods which had vested in them in property and right of possession, and which were in the Defendant's actual possession, or had reached his hands at

or after the suppression of the rebellion. It is necessary to consider the bill as respects that part of the case, and here it seems to me to fail absolutely. There is no allegation of any equity, there is no allegation of anything but the plainest and most ordinary legal right—the right to recover large sums of money and large quantities of goods of the Plaintiffs in the hands of the Defendant, without any suggestion of anything whatever to render necessary or proper, or to justify, the interposition of this Court as a Court of Equity. But of this allegation, insufficient as it appears to me to justify a bill for an account in equity, there is not, in my judgment, a particle of evidence. There is abundant evidence of the agency of the Defendant as agent of the Confederate government. There is abundant evidence that large amounts of money belonging to that government as its public property were dealt with in such a way as to make the Defendant accountable to his principals for his receipts and payments; but of the essential fact—essential, I mean, on this, the real subject of the suit—that any moneys or goods of the Plaintiffs (moneys or goods of the Plaintiffs in their own right, as distinguished from their right as the successors *de facto* of the suppressed government) ever reached the hands of the Defendant, or that there were in his hands on or after the suppression of the rebellion any public moneys or goods which had become vested in them, there is absolutely not a title of evidence.

The Plaintiff's case, therefore, has in my judgment wholly failed and the bill must be dismissed, and, of course, dismissed with costs.

TERLINDEN v. AMES.

SUPREME COURT OF THE UNITED STATES. 1902.
184 U. S. 270.

[Terlinden, a citizen of the Kingdom of Prussia, was charged with having committed in that country in the year 1901 various acts of forgery and counterfeiting and was arrested in Chicago on complaint of the German consul, who alleged that he was a fugitive from justice and that he had committed offenses which were extraditable under the treaty made in 1852 by

the United States and the Kingdom of Prussia. Terlinden petitioned for a writ of *habeas corpus* on the ground *inter alia* that the treaty between the United States and Prussia had been terminated by the formation of the German Empire in 1871. The District Court dismissed the petition and the petitioner appealed.]

MR. CHIEF JUSTICE FULLER . . . delivered the opinion of the court. . . .

This brings us to the real question, namely, the denial of the existence of a treaty of extradition between the United States and the Kingdom of Prussia, or the German Empire. In these proceedings the application was made by the official representative of both the Empire and the Kingdom of Prussia, but was based on the extradition treaty of 1852. The contention is that, as a result of the formation of the German Empire, this treaty had been terminated by operation of law.

Treaties are of different kinds and terminable in different ways. The fifth article of this treaty provided, in substance, that it should continue in force until 1858, and thereafter until the end of a twelve months' notice by one of the parties of the intention to terminate it. No such notice has ever been given, and extradition has been frequently awarded under it during the entire intervening time.

Undoubtedly treaties may be terminated by the absorption of Powers into other Nationalities and the loss of separate existence, as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance.

This treaty was entered into by His Majesty the King of Prussia in his own name and in the names of eighteen other States of the Germanic Confederation, including the Kingdom of Saxony and the free city of Frankfort, and was acceded to by six other States, including the Kingdom of Württemberg, and the free Hanseatic city of Bremen, but not including the Hanseatic free cities of Hamburg and Lubeck. The war between Prussia and Austria in 1866 resulted in the extinction of the Germanic Confederation and the absorption of Hanover,

Hesse Cassel, Nassau and the free city of Frankfort, by Prussia.

The North German Union was then created under the *præsidium* of the Crown of Prussia, and our minister to Berlin, George Bancroft, thereupon recognized officially not only the Prussian Parliament, but also the Parliament of the North German United States, and the collective German Customs and Commerce Union, upon the ground that by the paramount constitution of the North German United States, the King of Prussia, to which he was accredited, was at the head of those several organizations or institutions; and his action was entirely approved by this Government. Messages and Documents, Dep. of State, 1867-8, Part I, p. 601; Dip. Correspondence, Secretary Seward to Mr. Bancroft, Dec. 9, 1867.

February 22, 1868, a treaty relative to naturalization was concluded between the United States and His Majesty, the King of Prussia, on behalf of the North German Confederation, the third article of which read as follows: "The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part and Prussia and other States of Germany on the other part, the sixteenth day of June, one thousand eight hundred and fifty-two, is hereby extended to all the States of the North German Confederation." 15 Stat. 615. This recognized the treaty as still in force, and brought the Republics of Lubeck and Hamburg within its scope. Treaties were also made in that year between the United States and the Kingdoms of Bavaria and Württemberg, concerning naturalization, which contained the provision that the previous conventions between them and the United States in respect of fugitives from justice should remain in force without change.

Then came the adoption of the Constitution of the German Empire. It found the King of Prussia, the chief executive of the North German Union, endowed with power to carry into effect its international obligations, and those of his kingdom, and it perpetuated and confirmed that situation. The official promulgation of that Constitution recited that it was adopted instead of the Constitution of the North German Union, and its preamble declared that "His Majesty the King of Prussia, in the name of the North German Union, his Majesty the King of Bavaria, His Majesty the King of Württemberg, His Highness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse and by Rhine for those parts of the

Grand Duchy of Hesse which are situated south of the Main, conclude an eternal alliance for the protection of the territory of the Confederation, and of the laws of the same, as well as for the promotion of the welfare of the German people." As we have heretofore seen, the laws of the Empire were to take precedence of those of the individual States, and it was vested with the power of general legislation in respect of crimes.

Article 11 read, "The King of Prussia shall be the president of the Confederation, and shall have the title of German Emperor. The Emperor shall represent the Empire among nations, declare war, and conclude peace in the name of the same; enter into alliances and other conventions with foreign countries, accredit ambassadors, and receive them. . . . So far as treaties with foreign countries refer to matters which, according to Article IV, are to be regulated by the legislature of the Empire, the consent of the Federal Council shall be required for their ratification, and the approval of the Diet shall be necessary to render them valid."

It is contended that the words in the preamble translated "an eternal alliance" should read "an eternal union," but this is not material, for admitting that the Constitution created a composite State instead of a system of confederated States, and even that it was called a confederate Empire rather to save the *amour propre* of some of its component parts than otherwise, it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that treaties theretofore entered into by it could not be performed either in the name of its King or that of the Emperor. We do not find in this constitution any provision which in itself operated to abrogate existing treaties or to affect the status of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obligations have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed.

And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance. During the period from 1871 to the present day, extradition from this country to Germany, and from Germany to this country, has been frequently granted under the treaty, which has thus been repeatedly recognized by

both governments as in force. Moore's Report on Extradition with Returns of all Cases, 1890.

In 1889, in response to a request for information on international extradition as practiced by the German Government, the Imperial Foreign Office transmitted to our chargé at Berlin a memorial on the subject, in the note accompanying which it was said: "The questions referred to, in so far as they could not be uniformly answered for all the confederated German States, have been answered in that document as relating to the case of applications for extradition addressed to the Empire or Prussia." It was stated in the memorial, among other things:

"In so far as by laws and treaties of the Empire relating to the extradition of criminals, provisions which bind all the States of the union have not been made, those States are not hindered from independently regulating extradition by agreements with foreign States, or by laws enacted for their own territory.

"Of conventions, some of an earlier, some of a later period, for the extradition of criminals, entered into by individual States of the union with various foreign States, there exist a number, and in particular such with France, the Netherlands, Austria-Hungary, and Russia. With the United States of America, also, extradition is regulated by various treaties, as, besides the treaty of June 16, 1852, which applies to all of the States of the former North German Union, and also to Hesse, south of the Main, and to Würtemberg, there exist separate treaties with Bavaria and Baden, of September 12, 1853, and January 30, 1857, respectively." Moore's Report, 93, 94.

Thus it appears that the German Government has officially recognized, and continues to recognize, the treaty of June 16, 1852, as still in force, as well as similar treaties with other members of the Empire, so far as the latter has not taken specific action to the contrary or in lieu thereof. And see Laband, *Das Staatsrecht des Deutschen Reiches*, (1894), 122, 123, 124, 142.

It is out of the question that a citizen of one of the German States, charged with being a fugitive from its justice, should be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the Empire as to its powers and the powers of its members, and especially as the Executive De-

partment of our Government has accepted these conclusions and proceeded accordingly.

The same is true as respects many other treaties of serious moment, with Prussia, and with particular States of the Empire, and it would be singular, indeed, if after the lapse of years of performance of their stipulations, these treaties must be held to have terminated because of the inability to perform during all that time of one of the parties.

In the notes accompanying the State Department's compilation of Treaties and Conventions between the United States and other Powers, published in 1889, Mr. J. C. Bancroft Davis treats of the subject thus:

"The establishment of the German Empire in 1871, and the complex relations of its component parts to each other and to the Empire, necessarily give rise to questions as to the treaties entered into with the North German Confederation and with many of the States composing the Empire. It cannot be said that any fixed rules have been established.

"Where a State has lost its separate existence, as in the case of Hanover and Nassau, no questions can arise.

"Where no new treaty has been negotiated with the Empire, the treaties with the various States which have preserved a separate existence have been resorted to.

"The question of the existence of the extradition treaty with Bavaria was presented to the United States District Court, on the application of a person accused of forgery committed in Bavaria, to be discharged on *habeas corpus*, who was in custody after the issue of a mandate, at the request of the minister of Germany. The court held that the treaty was admitted by both governments to be in existence.

"Such a question is, after all, purely a political one."

The case there referred to is that of *In re Thomas*, 12 Blatch. 370, in which the continuance of the extradition treaty with Bavaria was called in question. . . .

We concur in the view that the question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard. . . .

The District Court was right, and its final order is

Affirmed.

WEST RAND CENTRAL GOLD MINING COMPANY,
LIMITED, v. THE KING.

KING'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE OF ENGLAND
1905.

Law Reports [1905] 2 K. B. 391.

[Petition of right which alleged that before the outbreak of the South African War, gold, the produce of a mine in the South African Republic owned by the suppliants, had been seized by officials of that Republic, which gold or its value, under the laws of the Republic, the government thereof was bound to return. The suppliants contended that by reason of the conquest and annexation of the territories of the Republic by Her late Majesty, Queen Victoria, the obligation of the government thereof towards the suppliant was now binding upon His Majesty the King.]

LORD ALVERSTONE, C. J. In this case the Attorney-General, on behalf of the Crown, demurred to a petition of right presented in the month of June, 1904, by the West Rand Central Gold Mining Company, Limited. . . .

The Attorney-General for the Crown, as well as Lord Robert Cecil for the suppliants, desired that we should deal with the case as if any necessary amendment had been made, and decide the question whether all the contractual obligations of a State annexed by Great Britain upon conquest are imposed as a matter of course, and in default of express reservations, upon Great Britain, and can be enforced by British municipal law against the Crown in the only way known to British municipal law, that is by a petition of right. We have no hesitation in answering this question in the negative, but, inasmuch as it one of great importance, and we have had the advantage of hearing very able argument upon both sides, we think it right to give our reasons in some detail.

Lord Robert Cecil argued that all contractual obligations incurred by a conquered State, before war actually breaks out, pass upon annexation to the conqueror, no matter what was their nature, character, origin, or history. . . . His main proposition was divided into three heads. First, that, by international law, the Sovereign of a conquering State is liable for the obligations of the conquered; secondly, that international

law forms part of the law of England; and, thirdly, that rights and obligations, which were binding upon the conquered State, must be protected and can be enforced by the municipal Courts of the conquering State.

In support of his first proposition, Lord Robert Cecil cited passages from various writers on international law. . . . Before, however, dealing with the specific passages in the writings of jurists upon which the suppliants rely, we desire to consider the proposition, that by international law the conquering country is bound to fulfil the obligations of the conquered, upon principle; and upon principle we think it cannot be sustained. When making peace the conquering Sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them. It is a case in which the only law is that of military force. This, indeed, was not disputed by counsel for the suppliants; but it was suggested that although the Sovereign when making peace may limit the obligations to be taken over, if he does not do so they are all taken over, and no subsequent limitation can be put upon them. What possible reason can be assigned for such a distinction? Much inquiry may be necessary before it can be ascertained under what circumstances the liabilities were incurred, and what debts should *in foro conscientiae* be assumed. There must also be many contractual liabilities of the conquered State of the very existence of which the superior Power can know nothing, and as to which persons having claims upon the nation about to be vanquished would, if the doctrine contended for were correct, have every temptation to concealment—others, again, which no man in his senses would think of taking over. A case was put in argument which very well might occur. A country has issued obligations to such an amount as wholly to destroy the national credit, and the war, which ends in annexation of the country by another Power, may have been brought about by the very state of insolvency to which the conquered country has been reduced by its own misconduct. Can any valid reason be suggested why the country which has made war and succeeded should take upon itself the liability to pay out of its own resources the debts of the insolvent State, and what difference can it make that in the instrument of annexation or cessation of hostilities matters of this kind are not provided for? We can well understand that, if by public proclamation or by con-

vention the conquering country has promised something that is inconsistent with the repudiation of particular liabilities, good faith should prevent such repudiation. We can see no reason at all why silence should be supposed to be equivalent to a promise of universal novation of existing contracts with the Government of the conquered State. It was suggested that a distinction might be drawn between obligations incurred for the purpose of waging war with the conquering country and those incurred for general State expenditure. What municipal tribunal could determine, according to the laws of evidence to be observed by that tribunal, how particular sums had been expended, whether borrowed before or during the war? It was this and cognate difficulties which compelled Lord Robert Cecil ultimately to concede that he must contend that the obligation was absolute to take over all debts and contractual obligations incurred before war had been actually declared.

Turning now to the text-writers, we may observe that the proposition we have put forward that the conqueror may impose what terms he thinks fit in respect of the obligations of the territory, and that he alone must be the judge in such a matter, is clearly recognized by Grotius: see "War and Peace," book iii. chap. 8, s. 4, and the Notes to Barbeyrac's edition of 1724, vol. ii. p. 632. For the assertion that a line is to be drawn at the moment of annexation, and that the conquering Sovereign has no right at any later stage to say what obligations he will or will not assume, we venture to think that there is no authority whatever. A doctrine was at one time urged by some of the older writers that to the extent of the assets taken over by the conqueror he ought to satisfy the debts of the conquered State. It is, in our opinion, a mere expression of the ethical views of the writers; but the proposition now contended for is a vast extension even of that doctrine. It has been urged that in numerous cases, both of peace and of cession of territories, special provision has been made for the discharge of obligations by the country accepting the cession or getting the upper hand in war; but, as we have already pointed out, conditions the result of express mutual consent between two nations afford no support to the argument that obligations not expressly provided for are to follow the course, by no means uniform, taken by such treaties. See as to this, s. 27 of the 4th edition of Hall's *International Law*, and the opinion of Lord Clarendon there cited. Lord Robert Cecil cited a passage from Mr. Hall's book,

4th ed. p. 105, in which he states that the annexing Power is liable for the whole of the debts of the State annexed. It cannot, however, be intended as an exhaustive or unqualified statement of the practice of nations, whatever may have been the opinion of the writer as to what should be done in such cases. It is not, in our opinion, directed to the particular subject now under discussion. The earlier parts of the same chapter contain passages inconsistent with any such view. We would call attention particularly to s. 27 on pp. 98 and 99 of the 4th edition, where the question as to the extent to which obligations do not pass is discussed, and the passages on pp. 101 and 102, referring to the discussion between England and the United States in 1854, in which Lord Clarendon's contention that Mexico did not inherit the obligations or rights of Spain is approved of by Mr. Hall. In the same way the passage from Halleck, s. 25 of chap. 34 (Sir Sherston Baker's edition of 1878), cited by Lord Robert Cecil, cannot be construed as meaning to lay down any such general proposition. It is cited from a chapter in which other sections contain passages inconsistent with the view that the legal obligation to fulfil all contracts passed to the conquering State. The particular section is in fact directed to the obligations of the conquering or annexing State upon the rights of private property of the individual—the point which formed the subject of discussion in the American cases upon which the suppliants replied and with which we shall deal later on. The passage from Wheaton (Atlay's ed. p. 46, s. 30) shows that the writer was only expressing an opinion respecting the duty of a succeeding State with regard to public debts, and, as the note to the passage shows, it is really based upon the fact that many treaties have dealt with such obligations in different ways. We have already pointed out how little value particular stipulations in treaties possess as evidence of that which may be called international common law. We have not had the opportunity of referring to the edition of Calvo, cited by Lord Robert Cecil, but the sections of the 8th book of the edition published in 1872 contain a discussion as to the circumstances under which certain obligations should be undertaken by the conquering State. The distinction between the obligations of the successor with regard to the private property of individuals on the one hand, and the debts of the conquered State on the other, is clearly pointed out, and paragraphs 1005 and 1010 are quite inconsistent with any recognition by the author of the

proposition contended for by the suppliants. The same observations apply to Heffter, another work upon which reliance was placed. As regards Max Huber's work on State Succession, published in 1898, there is no doubt, as appears from Mr. Westlake's recent book on international law, published last year, and from other criticisms, that Huber does attempt to press the duty of a succeeding or conquering State to recognize the obligations of its predecessor to a greater extent than previous writers on international law, but the extracts cited by the Attorney-General in his reply and other passages in Huber's book show that even his opinion falls far short of the proposition for which the suppliants contend. But whatever may be the view taken of the opinions of these writers, they are, in our judgment, inconsistent with the law as recognised for many years in the English Courts; and it is sufficient for us to cite the language of Lord Mansfield in *Campbell v. Hall*, 1 Cowp. 204, 209, in a passage the authority of which has, so far as we know, never been called in question: "It is left by the Constitution to the King's authority to grant or refuse a capitulation. . . . If he receives the inhabitants under his protection and grants them their property he has a power to fix such terms and conditions as he thinks proper. He is entrusted with making the treaty of peace; he may yield up the conquest or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion." And so, much earlier, in the year 1722 (2nd Peere Williams, p. 75), it is said by the Master of the Rolls to have been determined by the Lords of the Privy Council that "where the King of England conquers a country it is a different consideration, for there the conqueror by saving the lives of the people conquered gains a right and property in such people, in consequence of which he may impose upon them what laws he pleases." References were made to many cases of cession of territory not produced by conquest, and the frequent assumption in such cases of the liabilities of the territory ceded by the State accepting the cession was referred to. They may be dismissed in a sentence. The considerations which applied to peaceable cession raise such different questions from those which apply to conquest that it would answer no useful purpose to discuss them in detail. . . . [Their Lordships' opinion on Lord Robert Cecil's second proposition is printed *ante*, 28.]

We are of opinion . . . that no right . . . is disclosed by the petition which can be enforced as against His Majesty in this or in any municipal Court; and we therefore allow the demurrer, with costs. *Judgment for the Crown.*

THE EASTERN EXTENSION, AUSTRALASIA AND
CHINA TELEGRAPH COMPANY v. THE UNITED
STATES.

COURT OF CLAIMS OF THE UNITED STATES. 1912.
48 Ct. Cl. 33.

PEELE, Ch. J. delivered the opinion of the court: . . .

The petition avers substantially that prior to the War with Spain the claimant herein, a British corporation, had by separate grants and concessions entered into contracts with the Spanish Government for the construction and operation at its own expense of certain submarine cables and telegraph land lines communicating between the Island of Luzon and certain other islands in the Philippine Archipelago and Hongkong, China, for which the Spanish Government agreed to pay the claimant an annual subsidy of £4,500, payable monthly at Manila by the chief treasury office of those islands.

That prior to December, 1898, the Philippine Archipelago, including the islands referred to, was under the control and sovereignty of the Government of Spain; but by Article III of the treaty of Paris of that date (30 Stat. L., 1754), ceding the Philippine Archipelago to the United States, the control and sovereignty of Spain passed to the control and sovereignty of the United States, who thereupon took possession of said islands and, as averred, assumed "jurisdiction and control over all property and property rights in and upon said Philippine Islands, including the several lines of submarine cable and telegraph land lines established, constructed, and operated by the claimant, and availed itself of all the benefits and advantages thereof, using said lines of cable and telegraph for its governmental and other purposes, which it has continued to do ever since and still continues to do" without the payment of said annual subsidy of £4,500 so theretofore agreed to be paid by the Spanish Government.

By Article VIII of the treaty all buildings, wharves, public highways, forts, and all public property which by law belong to the public domain, and as such to the Crown of Spain, were ceded or relinquished to the United States, for which it is understood \$20,000,000 were paid; and it was therein provided that the relinquishment or cession "can not in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of Provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be."

Upon investigation it will be found that the foregoing is the usual stipulation in treaties and is in effect a declaration of the rights of the inhabitants under international law. (*United States v. de la Arredondo*, 6 Pet., 691, 712.) . . .

In the case of *Cessna v. United States* (169 U. S., 165, 186) the court observed: "It is the duty of a nation receiving a cession of territory to respect all rights of property as those rights were recognized by the nation making the cession, but it is no part of its duty to right the wrongs which the grantor may have theretofore committed."

This, however, in the absence of a stipulation in the treaty therefor, does not mean that the United States assumed the personal obligations or debts of the Spanish Government to individuals or corporations unless under the rules of international law they thereby became liable. When the United States succeeded to the sovereignty of Spain over the islands they were under no more obligation to continue the contracts for public or private service of individuals or corporations than they were to continue in office officials appointed by the Spanish Government. (*Sanchez v. United States*, 42 C. Cls, 458; affirmed 216 U. S., 167.)

The cables so constructed under the grants or contracts aforesaid were not public property belonging to the Crown of Spain, and therefore did not pass to the United States by the treaty, but were the private property of the claimant, and, so far as the averments of the petition show, were so recognized by the United States. . . .

It is not averred that the Government seized or took physical possession of the cables or that, as sovereign over the islands,

it did other than assume jurisdiction and control over all property and property rights therein, including the submarine cable and telegraph lines of the claimant, using the latter for its governmental and other purposes, for which it made compensation.

There is no averment that the rights of the claimant in and to the ownership and control of its cable and telegraph lines were in any way interrupted or interfered with by the officers of the Government other than for the transmission of messages, for which compensation was made; and if they were, such acts would constitute a tort, over which this court would have no jurisdiction. . . .

The obligation of Spain to the claimant was not the obligation of the Philippine Archipelago, though the Spanish Government saw fit to pay the subsidy out of the revenues of the islands; but if we were to assume that it was, the United States, in the absence of treaty stipulation, such as is referred to in Hall's International Law, sec. 28, p. 104, would not be liable therefor. If we were to assume that the obligations of Spain to the claimant was a general debt of the Spanish Government, it would be a personal one, as laid down in Hall's International Law, p. 99, note; and being a personal obligation would not in the absence of a treaty stipulation therefor, attach to the United States. . . .

The court is without jurisdiction . . . and therefore the demurrer must be sustained, . . . and the petition dismissed.

NOTE.—The authorities are in much confusion as to the effect which a transfer of jurisdiction produces upon the rights and obligations of the ceded territory, the ceding state and the receiving state. This is partly because the facts of each case are likely to present some peculiar features which make it difficult to deduce a general rule. A principle which is often invoked was well expressed by General Botha when he said to the British upon the surrender of the Boer armies, "Our view is that having taken the assets of our Government, you may fairly be expected to meet their liabilities, not in part, but in full." As a result of a transfer of jurisdiction a state may be extinguished, as were Texas and Hawaii when annexed by the United States, and the Boer republics when annexed by Great Britain, and Korea when annexed by Japan, and Austria-Hungary when it was dismembered at the close of the Great War; or a district may be transferred the revenues of which have been pledged to the payment of a particular debt, as in the case of parts of Peru annexed by Chili. If public debts are involved they may have been contracted by a government which the new sovereign does not consider to have been duly authorized thereto, as in the case of certain debts contracted by the Fiji Islands shortly before their annexation by Great Britain;

or the debt may have been contracted for a purpose which the new sovereign does not approve, as in the case of the Cuban debt, much of which had been contracted by Spain for the purpose of subjugating Cuba.

The changes produced by the Great War in the territorial arrangements and political organization of Europe have greatly enhanced the importance of the principal of state succession. Germany has lost much territory and has changed its form of government. Russia likewise has changed its form of government and within its former boundaries several new states, Finland, Esthonia, Latvia and Lithuania—sometimes called the Russian succession states—have been formed. Similar changes have been made in the Turkish dominions. In all these cases, however, the political entity known as Germany, Russia or Turkey still remains and the governmental and territorial changes have not altered the state's identity. The Austro-Hungarian monarchy on the other hand has disintegrated. Portions of its dominions have been ceded to Poland, Roumania, Jugo-Slavia and Italy, while the remainder has been dismembered and organized as independent units known as Austria, Czechoslovakia, Hungary and the Free State of Fiume. None of these new organizations stands in such a relation to the old Austria-Hungary that it can be regarded as its successor. The situation is analogous to that which would arise if the American Union should dissolve and each of the forty-eight States should establish itself as an independent nation. In such a case no one of them could be said to be the successor of the United States. In connection with the Austrian succession states questions analogous to the following may arise:

1. If Austria-Hungary in 1910 had made a treaty with Spain giving to Spanish merchant vessels certain rights in the harbor of Fiume, would the Free State of Fiume be under obligation to observe the terms of the treaty?
2. If bonds were issued by Austria-Hungary in 1910, what state, if any, is now bound to pay them?
3. If Austria-Hungary in 1910 borrowed money for the construction of docks in Trieste, which now belongs to Italy, is the loan an obligation on either Trieste or Italy?
4. If Austria-Hungary in 1910 borrowed money for the construction of war-vessels and pledged the revenue from state property in Bohemia to the repayment of the loan, is there now any obligation on Czechoslovakia?

For an account of the numerous economic problems growing out of the disintegration of Austria-Hungary, see "The Pontorose Conference," The American Association for International Conciliation, *Bulletin* No. 176 (July, 1922).

The temporary military occupant of a country does not succeed to the political or proprietary rights of the power which it has dispossessed, and therefore it does not succeed to the obligations created by that power with reference to the occupied territory. Replying to an inquiry concerning concessions made by Spain to a British company for the construction of cables in Cuba, Attorney-General Griggs

said, March 17, 1899:

American control of Cuba is essentially, and merely, that of a temporary military occupant. Our obligations, therefore, are those which arise from that fact. Benefits to the island and obligations local to the island, so far as becoming obligations of the United States, would seem from their very nature obligations of the island or its people, and not of a military occupant entering for a single and temporary purpose. . . . Our Government is . . . merely an intervening power arranging the succession.

Opinions of the Attorney-General, XXII, 385.

For general discussions of the principle of state succession see Borchard, sec. 83; Huber, *Die Staatensuccession*; Appleton, *Des Effets des Annexions de Territoires sur les Dettes de l'État démembré ou annexé*; Westlake, I, 74; Keith, *The Theory of State Succession*; Sir H. Erle Richards, "The Liabilities of a Conqueror," *Law Magazine and Review*, XXVIII, 129; Cobbett, *Cases and Opinions* I, 73; Bonfils (Fauchille), sec. 214.

As to the Fijian debt, see Moore, *Digest*, I, 347. As to the Cuban debt and the argument for and against its assumption, see Moore, *Digest*, I, 351. As to the debts of Hawaii, see 22 *Opinions of the Attorney-General*, 584. For the effect of a transfer of jurisdiction on treaties, see Crandall, 425; Moore, *Digest*, V, 341. As to the effect of the annexation of Algiers by France on treaties between Algiers and the United States, see *Mahoney v. United States* (1869), 10 Wallace, 62. When a man was arrested in the United States and held for extradition to Great Britain for an offense committed in the South African Republic before its annexation by Great Britain, it was held the treaty of extradition between Great Britain and the United States could not apply to offenses committed in places which were not under British jurisdiction at the time of their commission, and as there had been no extradition treaty between the United States and the South African Republic, the prisoner was released, *In re Taylor* (1902), 118 Fed. 196. For various questions arising out of the conquest of the Boer republics by Great Britain, see Keith, "Colonial Cases Relating to the Succession of States," *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, III, 618.

On the question as to whether a state is bound to recognize the contracts and concessions made by its predecessor in title, see Gidel, *Des Effets de l'Annexion sur les Concessions*; Sayre, "Change of Sovereignty and Concessions," *Am. Jour. Int. Law*, XII, 705; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489; Report of the Transvaal Concession Commission, *Blue Book, South Africa*, June, 1901, parts of which are given in Moore, *Digest*, I, 411. As to Spanish concessions in Cuba, Porto Rico, and the Philippines, see Magoon, *Reports*, and the opinions of Attorney-General Griggs in 22 *Opinions of the Attorney-General*, 384, 408, 520, 546, 551, 654, and 23 *Ib.* 181, 195, 425, 451. Some of these may also be found in Moore, *Digest*, I, 390 *seq.* As to the effect of the extinction of a state upon corporations formed under its laws, see Pennant, "The International Status of Modern Corporations," *Law Magazine and Review*, XXVIII, 161.

CHAPTER V.

JURISDICTION.

SECTION 1. THE TERRITORIAL SOVEREIGNTY OF THE STATE.

CHAE CHAN PING v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1889.
130 U. S. 581.

[The appellant, a subject of the Emperor of China, had resided in the United States from 1875 to 1887, when he went to China, having in his possession a certificate which under the treaties and statutes then in force entitled him to return to the United States. Upon his arrival in San Francisco in 1888, the Collector of the Port refused to allow him to land on the ground that his certificate had been annulled by the act of Congress of October 1, 1888. The appellant argued that the act was invalid (1) because it contravened the provisions of the treaty between the United States and China and (2) because it violated rights vested in citizens of China by earlier statutes. Only so much of the opinion as relates to the second point is here given.]

MR. JUSTICE FIELD delivered the opinion of the court. . . .

There being nothing in the treaties between China and the United States to impair the validity of the act of Congress of October 1, 1888, was it on any other ground beyond the competency of Congress to pass it? If so, it must be because it was not within the power of Congress to prohibit Chinese laborers who had at the time departed from the United States, or should subsequently depart, from returning to the United States. Those laborers are not citizens of the United States; they are aliens. That the government of the United States through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an

incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. As said by this court in the case of *The Exchange*, 7 Cranch, 116, 136, speaking by Chief Justice Marshall: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations. As said by this court in the case of *Cohens v. Virginia*, 6 Wheat. 264, 413, speaking by the same great Chief Justice: "That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for

these objects, it is supreme. It can then in effecting these objects legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate." The same view is expressed in a different form by Mr. Justice Bradley, in *Knox v. Lee*, 12 Wall. 457, 555, where he observes that "the United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all of which are forbidden to the state governments." . . .

The control of local matters being left to local authorities, and national matters being entrusted to the government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The government possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and

pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy.

The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments. . . . In a dispatch to Mr. Fay, our minister to Switzerland, in March, 1856, Mr. Marcy, Secretary of State under President Pierce, writes: "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war." "It may always be questionable whether a resort to this power is warranted by the circumstances, or what department of the government is empowered to exert it; but there can be no doubt that it is possessed by all nations, and that each may decide for itself when the occasion arises demanding its exercise." In a communication in September, 1869, to Mr. Washburne, our minister to France, Mr. Fish, Secretary of State under President Grant, uses this language: "The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested. Strangers visiting or sojourning in a foreign country voluntarily submit themselves to its laws and customs, and the municipal laws of France, authorizing the expulsion of strangers, are not of such recent date, nor has the exercise of the power by the government of France been so infrequent, that sojourners within her territory can claim surprise when the power is put in force." In a communication to Mr. Foster, our minister to Mexico, in July, 1879, Mr. Evarts, Secretary of State under President Hayes, referring to the power vested in the constitution of Mexico to expel objectionable foreigners, says: "The admission that, as that constitution now stands and is interpreted, foreigners who render themselves harmful or objectionable to the general government must expect to be liable to the

exercise of the power adverted to, even in time of peace, remains, and no good reason is seen for departing from that conclusion now. But, while there may be no expedient basis on which to found objection, on principle and in advance of a special case thereunder, to the constitutional right thus asserted by Mexico, yet the manner of carrying out such asserted right may be highly objectionable. You would be fully justified in making earnest remonstrances should a citizen of the United States be expelled from Mexican territory without just steps to assure the grounds of such expulsion, and in bringing the fact to the immediate knowledge of the Department." In a communication to Mr. V. J. Stillman, under date of August 3, 1882, Mr. Frelinghuysen, Secretary of State under President Arthur, writes: "This government cannot contest the right of foreign governments to exclude, on police or other grounds, American citizens from their shores." Wharton's International Law Digest, § 206.

The exclusion of paupers, criminals and persons afflicted with incurable diseases, for which statutes have been passed, is only an application of the same power to particular classes of persons, whose presence is deemed injurious or a source of danger to the country. As applied to them, there has never been any question as to the power to exclude them. The power is constantly exercised; its existence is involved in the right of self-preservation. . . .

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the

nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject. . . .

Order affirmed.

LODEWYK JOHANNES DE JAGER v. THE ATTORNEY-
GENERAL OF NATAL.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1907.
Law Reports [1907] A. C. 326.

This was a petition for special leave to appeal from a judgment, reported in (1901) Natal L. R. p. 65, of a special Court constituted by Act XIV of 1900 of the Colony of Natal, whereby on March 14, 1901, the petitioner was adjudged guilty of high treason and was sentenced to five years' imprisonment and to pay a fine of £5000.

It alleged that the petitioner was a burgher of the late South African Republic, who for ten years and at the date of the outbreak of war in 1899 was peaceably residing in Waschbank, in Natal, and continued to do so after the battle of Elandslaagte on October 21 of that year while the Boer forces occupied that part of Natal in which Waschbank is situated and the British forces had retired to Ladysmith, whereby he lost the effective protection of Her late Majesty; that the Boers administered the government and remained in occupation till March, 1900; that the petitioner was thereupon compellable to join, and did join, the Boer forces, aided and assisted them both as commandant and as a commissioner and justice of the peace; and that after judgment as aforesaid he had undergone imprisonment and paid the fine imposed. . . .

Sir R. Finlay, K. C., and A. R. Kennedy, for the petitioner, contended that the petitioner owed only a local and temporary allegiance to Her Majesty whilst he was a resident in Natal and was actually enjoying Her Majesty's protection. The obligation ceased to be binding upon him when he was deprived of that

protection, and whilst, owing to the successful military occupation of the territory where he resided by the Boer forces, he was deprived of that protection, and was *de facto* under the government and control of the South African Republic. Aid and assistance given to the Boer forces by the petitioner under those circumstances were not treasonable, but acts which he was legally compellable to perform. It was not alleged against him that he had joined the invading forces prior to their having become established in possession and government of the territory. Thereupon, as a burgher of the Republic, he was compellable to serve. His duty of allegiance to the Queen had ceased, and his acts of service to his own Government were not treasonable as alleged. Reference was made to Coke's 3rd Inst. p. 4; Hale's Pleas of the Crown, vol. i, p. 94; Foster's Crown Cases, 2nd ed. (1776), 1st discourse, s. 2, 3rd ed. p. 185; 2 Halleck's International Law, 3rd ed. p. 450. . . .

LORD LOREBURN, L. C. The petitioner Lodewyk Johannes De Jager was adjudged guilty of high treason by the special Court constituted by Act No. XIV. of 1900 of the Colony of Natal, and now seeks special leave to appeal to His Majesty in Council from that judgment and the sentence which followed. The circumstances and the questions of law raised are fully set out in the petition and need not be repeated here. Their Lordships have not to consider any facts or feature of this case except the points of law upon which Sir Robert Finlay insisted.

It is old law that an alien resident within British territory owes allegiance to the Crown, and may be indicted for high treason, though not a subject. Some authorities affirm that this duty and liability arise from the fact that while in British territory he receives the King's protection. Hence Sir R. Finlay argued that when the protection ceased its counterpart ceased also, and that as the British forces evacuated Waschbank on October 21, 1899, the petitioner was lawfully entitled to assist the invaders on and after October 24 without incurring the penalty of high treason.

Their Lordships are of opinion that there is no ground for this contention. The protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful Sovereign, wrongs done during the foreign occupation are cognizable by

the ordinary Courts. The protection of the Sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled. Their Lordships consider that the duty of a resident alien is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident. He is not to take advantage of the hospitality extended to him against the Sovereign who extended it. In modern times great numbers of aliens reside in this and in most other countries, and in modern usage it is regarded as a hardship if they are compelled to quit, as they rarely are, even in the event of war between their own Sovereign and the country where they so reside. It would be intolerable, and must inevitably end in a restriction of the international facilities now universally granted, if, as soon as an enemy made good his military occupation of a particular district, those who had till then lived there peacefully as aliens could with impunity take up arms for the invaders. A small invading force might thus be swollen into a considerable army, while the risks of transport (which in the case of over-sea expeditions are the main risks of invasion) would be entirely evaded by those who, instead of embarking from their own country, awaited the expedition under the protection of the country against which it was directed. These considerations would not justify a British Court in deciding any case contrary to the law, but they offer an illustration of consequences which would follow if the law were as the petitioner maintains. There is no authority which compels their Lordships to arrive at so strange a conclusion. The questions raised are, no doubt, of general importance, but their Lordships, after hearing the arguments of counsel in support of the petition, do not consider the case to be attended with doubt, and they will therefore humbly advise His Majesty to dismiss this petition. . . .

AMERICAN BANANA COMPANY v. UNITED FRUIT COMPANY.

**SUPREME COURT OF THE UNITED STATES. 1909.
213 U. S. 347.**

Error to the Circuit Court of Appeals for the Second Circuit.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought to recover threefold damages under the Act to Protect Trade against Monopolies. July 2, 1890, c. 647, Sec. 7. 26 Stat. 209, 210. . . .

The allegations of the complaint may be summed up as follows: The plaintiff is an Alabama corporation, organized in 1904. The defendant is a New Jersey corporation, organized in 1899. Long before the plaintiff was formed, the defendant, with intent to prevent competition and to control and monopolize the banana trade, bought the property and business of several of its previous competitors, with provision against their resuming the trade, made contracts with others, including a majority of the most important, regulating the quantity to be purchased and the price to be paid, and acquired a controlling amount of stock in still others. For the same purpose it organized a selling company, of which it held the stock, that by agreement sold at fixed prices all the bananas of the combining parties. By this and other means it did monopolize and restrain the trade and maintained unreasonable prices. The defendant being in this ominous attitude, one McConnell in 1903 started a banana plantation in Panama, then part of the United States of Colombia, and began to build a railway (which would afford his only means of export), both in accordance with the laws of the United States of Colombia. He was notified by the defendant that he must either combine or stop. Two months later, it is believed at the defendant's instigation, the governor of Panama recommended to his national government that Costa Rica be allowed to administer the territory through which the railroad was to run, and this although that territory had been awarded to Colombia under an arbitration agreed to by treaty. The defendant, and afterwards, in September, the government of Costa Rica, it is believed by the inducement of the defendant, interfered with McConnell. In November, 1903, Panama revolted and became an independent republic, declaring its bound-

ary to be that settled by the award. In June, 1904, the plaintiff bought out McConnell and went on with the work, as it had a right to do under the laws of Panama. But in July, Costa Rican soldiers and officials, instigated by the defendant, seized a part of the plantation and a cargo of supplies and have held them ever since, and stopped the construction and operation of the plantation and railway. In August one Astua, by *ex parte* proceedings, got a judgment from a Costa Rican court, declaring the plantation to be his, although, it is alleged, the proceedings were not within the jurisdiction of Costa Rica, and were contrary to its laws and void. Agents of the defendants then bought the lands from Astua. The plaintiff has tried to induce the government of Costa Rica to withdraw its soldiers and also has tried to persuade the United States to interfere, but has been thwarted in both by the defendant and has failed. The government of Costa Rica remained in possession down to the bringing of the suit.

As a result of the defendant's acts the plaintiff has been deprived of the use of the plantation, and the railway, the plantation and supplies have been injured. The defendant also, by outbidding, has driven purchasers out of the market and has compelled producers to come to its terms, and it has prevented the plaintiff from buying for export and sale. This is the substantial damage alleged. There is thrown in a further allegation that the defendant has "sought to injure" the plaintiff's business by offering positions to its employes and by discharging and threatening to discharge persons in its own employ who were stockholders of the plaintiff. But no particular point is made of this. It is contended, however, that even if the main argument fails and the defendant is held not to be answerable for acts depending on the cooperation of the government of Costa Rica for their effect, a wrongful conspiracy resulting in driving the plaintiff out of business is to be gathered from the complaint and that it was entitled to go to trial upon that.

It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.

No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as

adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. See *The Hamilton*, 207 U. S. 398, 403; *Hart v. Gumpach*, L. R. 4 P. C. 439, 463, 464; *British South Africa Co. v. Companhia de Moçambique* [1893], A. C. 602. They go further, at times, and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute similar threats as to acts done within another recognized jurisdiction. An illustration from our statutes is found with regard to criminal correspondence with foreign governments. Rev. Stat., Sec. 5335. See further *Commonwealth v. Macloon*, 101 Massachusetts, 1; *The Sussex Peerage*, 11 Cl. & Fin. 85, 146. And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications. *Rex v. Sawyer*, 2 C. & K. 101; *The Zollverein, Swabey*, 96, 98. But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater v. Mexican National R. R. Co.*, 194 U. S. 120, 126. This principle was carried to an extreme in *Milliken v. Pratt*, 125 Massachusetts, 374. For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239; L. R. 6 Q. B. 1, 28; Dicey, *Conflict of Laws* (2d ed.), 647. See also Appendix, 724, 726, Note 2, *ibid.*

Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts. A threat that depends upon the choice of the party affected to bring himself within that power hardly would be called law in the ordinary sense. We do not speak of blockade running by neutrals as unlawful. And the usages of speech correspond to the limit of the attempts of the lawmaker, except in extraordinary cases. It is true that domestic corporations remain

always within the power of the domestic law, but in the present case, at least, there is no ground for distinguishing between corporations and men.

The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the law-maker has general and legitimate power. "All legislation is *prima facie* territorial." Ex parte Blain, In re Sawers, 12 Ch. Div. 522, 528; State v. Carter, 27 N. J. (3 Dutcher) 499; People v. Merrill, 2 Parker, Crim. Rep. 590, 596. Words having universal scope, such as "Every contract in restraint of trade," "Every person who shall monopolize," etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned. Other objections of a serious nature are urged but need not be discussed. . . .

Judgment affirmed.

CASDAGLI, Appellant v. CASDAGLI, Respondent.

HOUSE OF LORDS OF GREAT BRITAIN, 1918.

Law Reports [1919] A. C. 145.

Appeal from an order of the Court of Appeal, [1918], P. 89, affirming a judgment of Horridge, J.

In March, 1916, the respondent presented a petition for dissolution of her marriage with her husband, the appellant. . . .

HORRIDGE, J. found that the appellant had voluntarily fixed his residence in Egypt with an intention of remaining there for an unlimited time, but held, upon the authority of In re Tootal's Trusts, 23 Ch. D. 532, and Abd-ul-Messih v. Farra, 13 App. Cas. 431, that the appellant's residence in Egypt was ineffectual to create an Egyptian domicile of choice, and that his domicile of origin remained. He therefore dismissed the act on petition.

The Court of Appeal, by a majority (Swinfen Eady and Harrington L. JJ., Scutton L. J. dissenting), affirmed this decision. . . .

[The facts are stated in the opinion of the Lord Chancellor.]

LORD FINLAY L. C. My Lords, this appeal arises out of proceedings for divorce taken in the Divorce Court in England by the wife, the respondent in this appeal, against her husband, the appellant. The husband, by Act on Petition, alleged that he had acquired a domicile of choice in Egypt, that there was no English domicile, and that the English Court had no jurisdiction to entertain a suit against him for dissolution of marriage. The wife, by her answer, set up that the husband had never abandoned his domicile of origin, which was English, and that the Court, therefore, had jurisdiction. Evidence was taken orally and upon affidavit. The case was tried before Horridge J. He held that he was bound by authority to decide that a British subject, registered as such at the British Consulate, could not, in point of law, acquire a domicile in Egypt, and his decision was affirmed by the majority of the Court of Appeal (Swinfen Eady L. J. and Warrington L. J.), while Scrutton L. J. dissented, holding that there was no rule of law against the acquisition of a domicile in Egypt by a British subject. From the decision of the Court of Appeal the present appeal is now brought to your Lordship's House. The facts are not in dispute, and the only question is whether it is, in point of law, impossible for a registered British subject to acquire a domicile in Egypt. It was contended for the respondent that this point had been decided in her favour by Chitty J. in *In re Tootal's Trusts*, 23 Ch. D. 532, and by the Judicial Committee in *Abd-ul-Messih v. Farra*, 13 App. Cas. 431, and that these cases had been correctly decided and ought to be followed by your Lordships' House.

It is admitted that the appellant is, and always has been, a British subject. He was born in England in 1872, his father being a naturalized British subject residing in England, and carrying on business there and in Egypt. The appellant was taken to Egypt in 1879 on account of his health, and remained there until 1882, when he returned to England. He was educated in England and in France, and returned to Egypt in 1895 when he was 23 years of age. He resided in Alexandria from 1895 to 1900, and was engaged in his father's business there. In 1900 he went to Cairo to manage the business in Cairo, and

has resided in Cairo from that time until the present. He always has been, and is, a member of the Greek Orthodox Church, and the respondent, who was born in Egypt, is a member of the same Church. They were married according to the rites of their Church in Alexandria on July 1, 1905, and on the 5th of the same month the civil marriage took place at the British Consulate at Alexandria. The appellant was taken into partnership by his father, together with the appellant's four brothers, in 1910. The father died in 1911, and since his death the appellant has carried on the Egyptian branch of the business along with two of his brothers. The appellant has been, and is, registered as a British subject at the British Consulate at Cairo. Horridge J. found that the appellant had fixed his residence in Egypt with the intention of residing there for an unlimited time. He decided against the husband on the question of jurisdiction, not at all upon the facts as to residence, but simply on the ground that, in point of law, it was impossible for a British subject to acquire a domicile in Egypt on account of the extra-territorial rights which British subjects there enjoy. The same view was taken by the majority of the Court of Appeal.

Until December, 1914, Egypt was, in the contemplation of law, a part of the Ottoman dominions; but in that month the suzerainty of the Sultan of Turkey was terminated, and Egypt became a Sultanate under the protection of Great Britain. The capitulations which had long governed the position in Egypt of the subjects of Great Britain and of other European Powers remain in force at the present time. These capitulations are a series of treaties with the several European Powers. The capitulations between Great Britain and the Sultan of Turkey were confirmed by the Treaty of the Dardanelles in 1809, and by s. 16 of that Treaty it was provided that disputes amongst the English themselves should be decided by their own magistrate or consul according to their customs, without interference by the Turkish authorities. Consular Courts were accordingly established for the decision of such disputes between English subjects, not relating to land, and such Courts are now regulated in Egypt by the Egypt Order in Council of His Majesty dated February 16, 1915. By that Order the jurisdiction of the Consular Courts, which had been established by His Majesty in Egypt under the Capitulations, was continued. These Courts deal with disputes, not relating to land, the parties

to which are all British subjects, and all questions affecting the personal status of a British subject must be determined in the Consular Courts. There are also in Egypt what are termed Mixed Courts, for the purpose of dealing with disputes between foreigners of different nationalities, or between foreigners and natives of Egypt. These Mixed Courts were established by the Khedive in 1875, after negotiations with the European Powers. They are Egyptian Courts which administer the law promulgated formerly by the Khedive, and since December, 1914, by the Sultan of Egypt. The Courts of first instance consist of seven judges—4 foreigners and 3 Egyptian—while the Court of Appeal consists of 11 judges—7 foreigners and 4 Egyptian. The judges are appointed by the Egyptian Government after communication, in the case of foreigners, with the Government of the country to which they belong. These Courts have criminal jurisdiction over foreigners in the matters enumerated in the *Règlement d'Organisation Judiciaire pour les procès mixtes*, and have civil jurisdiction over all civil and commercial disputes between Egyptians and foreigners and between foreigners of different nationalities not relating to the law of personal status. They have also exclusive jurisdiction in actions relating to immovable property to which foreigners are parties. . . .

The Consular jurisdiction over British subjects in Egypt is exercised under the Order in Council of November 7, 1910, modified as regards Egypt by the Egypt Order in Council of February 6, 1915, which was made after the renunciation of allegiance to Turkey and the constitution of Egypt as a separate Sultanate under British protection. There is a Supreme Consular Court sitting at Alexandria, and Provincial Courts are provided for by art. 17 of the Order in Council. The Court has jurisdiction over British subjects in Egypt and any property there of any British subject, as also in respect of British ships within its limits. It has also jurisdiction in certain special cases with regard to Ottoman subjects and foreigners with the consent of their Government. Its jurisdiction is in matters criminal and matters civil. The article which is most directly relevant to the present proceedings is art. 103 of the Order in Council of 1910, which runs as follows: "The Supreme Court shall as far as circumstances admit have for and within the Ottoman Dominions with respect to British subjects all such jurisdiction in matrimonial cases, except the jurisdiction rela-

tive to dissolution or nullity or jactitation of marriage, as for the time being belongs to the High Court in England." It follows that the marriage between the appellant and the respondent could not be dissolved by the Consular Court. It was urged upon us that this pointed to the inference that the Divorce Court in England must have jurisdiction, as otherwise the wife would be unable to obtain anywhere the relief to which she alleges she is entitled. It is, however, well settled that the jurisdiction of the Divorce Court depends upon domicile. If the husband's domicile be English he or his wife may sue for a divorce in the English Court. If the domicile is not English jurisdiction will not be conferred by the fact that the relief cannot be obtained in the Consular Court. The fact that the acquisition by a British subject of an Egyptian domicile would make it impossible to get relief by way of divorce has no bearing on the question of law whether such a domicile can be obtained by him in point of law; it might conceivably in some cases form an element for consideration in inquiring whether he had the intention to acquire a domicile in Egypt.

The present case, therefore, depends upon the question whether the husband has an Egyptian or an English domicile. Upon the evidence, and according to the findings of the Courts below, the husband has done everything possible to acquire an Egyptian domicile, and this he had acquired unless, as a matter of law, it be impossible for a British subject in his position to acquire such a domicile. It was argued that British subjects in Egypt enjoy ex-territoriality, and that this prevents the acquisition of Egyptian domicile. This argument appears to me to rest upon a misconception as to the position of a British subject in Egypt. His position is in no respect analogous to that of an ambassador and his staff in a foreign country. He is subject to the law of Egypt as administered by the Mixed Tribunals, and pays taxes. It is true that on a criminal charge, not being one of those enumerated in the law as to Mixed Tribunals, he must be tried in His Majesty's Consular Court, and civil disputes between him and other British subjects and questions as to his personal status and succession must be there determined. The jurisdiction exercised by His Majesty in Egypt is indeed extra-territorial, but it is exercised with the consent of the Egyptian Government, and its jurisdiction is therefore, for this purpose, really part of the law of Egypt affecting foreigners there resident. The position of a British subject in

Egypt is not extra-territorial; if resident there, he is subject to the law applicable to persons of his nationality. Whether that law owes its existence simply to the decree of the Government of Egypt or to the exercise by His Majesty of the powers conferred on him by treaty is immaterial.

It has often been pointed out that there is a presumption against the acquisition by a British subject of a domicile in such countries as China and the Ottoman dominions, owing to the difference of law, usages, and manners. Before special provision was made in the case of foreigners resident in such countries for the application to their property of their own law of succession, for their trial on criminal charges by Courts which will command their confidence, and for the settlement of disputes between them and others of the same nationality by such Courts, the presumption against the acquisition of a domicile in such a country might be regarded as overwhelming unless under very special circumstances. But since special provision for the protection of foreigners in such countries has been made, the strength of the presumption against the acquisition of a domicile there is very much diminished. Egypt affords a very good illustration of this. What presumption is there against the acquisition of an Egyptian domicile by a British subject when the country is under British protection and when the British subject is safeguarded in all his rights in the manner which I have described? The question is one to be tried on the ordinary principles applicable to such questions of fact. The view that it is impossible in point of law could be supported only on the assumption that the doctrine of ex-territoriality applies to all British subjects, so that though actually in Egypt they are in contemplation of law still in their own country, and that for this reason there is not, and cannot be, the residence in the particular locality necessary for the acquisition of domicile. Any such view as to impossibility appears to be erroneous in principle, and inconsistent with the evidence in this case as to the position of a foreigner resident in Egypt. It is, however, necessary to examine the authorities which were strongly pressed upon us as showing that the point should be treated by this House as no longer open to discussion.

In the case of *The Indian Chief*, 3 C. Rob. 12, the question arose whether the owner of cargo, being an American citizen resident at Calcutta, should be treated as a British subject so as to render illegal his trading with the enemy. All that was

decided in the case was that the nominal sovereignty of the Great Mogul might for this purpose be disregarded, and that the cargo-owner, as he resided and traded in Calcutta under the Government of the East India Company, must be treated as a British subject, and as he had traded with the enemy the cargo was condemned. The case was cited merely on account of the passage in Sir W. Scott's judgment in which he explains, with even more than his wonted charm of expression, the position of foreign traders in Eastern countries. The passage illustrates the presumption against the acquisition of a domicile of choice in such Eastern countries, but is not otherwise relevant to the present discussion.

In 1844 the case of *Maltass v. Maltass*, 1 Rob. Eccl. 67, 80, came before Dr. Lushington sitting for Sir H. Jenner Fust in the Prerogative Court of Canterbury. The question was as to the law which should govern the will of a British subject who for many years had resided in Smyrna. Dr. Lushington found that the deceased was a British subject, and then proceeded to inquire whether he was domiciled in Smyrna, but pointed out that this inquiry would be superfluous if, with respect to his succession, the law of England and the law applicable in Turkey were the same. Referring to the provisions of the Capitulations that the property of British subjects dying in Turkey should be disposed of according to English law, he held that this applied even in cases in which the deceased had become domiciled in Turkey, and that it was immaterial whether he had acquired a domicile in Smyrna or retained his English domicile, as in either case the English law would apply. He concluded with the following observations: "I give no opinion, therefore, whether a British subject can or cannot acquire a Turkish domicile; but this I must say,—I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the Dominions of the Porte. As to British subjects, originally Mussulmen, as in the East Indies, or becoming Mussulmen, the same reasoning does not apply to them as Lord Stowell has said does apply in cases of a total and entire difference of religion, customs, and habits." The language of Dr. Lushington in this judgment lends no countenance to the idea that it is impossible for an English subject to acquire a domicile of choice in a country like Turkey. So far as he touches upon the question at all, he treats it not as a matter of law but as a question of fact.

In 1882 the case of *Tootal's Trusts*, 23 Ch. D. 532, 534, was decided by Chitty J. In that case a petition was presented by residuary legatees asking for a declaration that the testator was domiciled at Shanghai at the time of his death, and consequently that no legacy duty was payable. The testator was a British subject who resided at Shanghai and died there. If the domicile was English the duty was payable, while if the deceased had acquired a domicile in China the duty was not payable. The testator had for some years before his death determined to reside permanently at Shanghai, and had formed and expressed the intention of never returning to England. It was admitted that it could not be contended that the domicile was Chinese. It is clear that what was meant by this admission was that it could not be contended that the testator had become domiciled in China so as to attract to his estate the law applicable in China to natives of that country, and Chitty J. said: "This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicile, and brings the case within the principles laid down by Lord Stowell in his celebrated judgment in *The Indian Chief*, 3 C. Rob. 22, 29, and by Dr. Lushington in *Maltass v. Maltass*, 1 Rob. Eccl. 67, 80, 81." Both of these great judges had treated the question as one of fact, and had pointed out the improbability of the acquisition of such a domicile. It is obvious that the admission that there was no Chinese domicile in that sense was rightly made. What the petitioners contended for in *Tootal's Trusts* was what is there called an Anglo-Chinese domicile. Some criticism has been bestowed upon this and analogous expressions, but it appears to me that the expression "Anglo-Chinese domicile" is apt to denote compendiously a domicile in China acquired by a British subject and carrying with it the privileges conferred by treaty upon British subjects there residing. These privileges appear to have been analogous to those enjoyed by British subjects residing in Egypt. At p. 536 Chitty J. says that the exception from the jurisdiction of His Majesty's Supreme Court at Shanghai as a matrimonial Court in regard to dissolution, nullity, or jactitation of marriage, apparently left Englishmen subject to the jurisdiction of the Court for matrimonial causes in England in respect of such matters. This statement requires qualification. The absence of provision for divorce in Shanghai cannot of itself confer

jurisdiction upon the English Court; it depends upon the question whether the domicile has remained English. If the English domicile has been replaced by an Anglo-Chinese one the jurisdiction of the English Courts would be gone.

Chitty J. went on to consider whether, on principle, an Anglo-Chinese domicile can be established. He came to the conclusion that "there is no such thing known to the law as an Anglo-Chinese domicile." The view of Chitty J. was that the domicile alleged is in its nature extra-territorial. I cannot agree. The position of British subjects in such a country is not extra-territorial. The domicile is acquired and can be acquired only by residence in Egypt. The law applicable to the foreigner so residing is, by the consent of the Egyptian Government, partly Egyptian and partly English. This is the result of the Convention between the two Governments. Though the domicile is Egyptian, the law applicable to persons who have acquired such a domicile varies according to the nationality of the person. The foreigner does not become domiciled as a member of the English community in Egypt, but he acquires an Egyptian domicile because he, by his own choice, has made Egypt his permanent home, and you have then to consider by what code of law he and his estate are governed according to the law in force in Egypt. The domicile is purely territorial, and you go to the law in force in the territory to see what system of law it treats as applicable to resident foreigners and to what Courts they are subject.

Chitty J. refers to the case of British India, where there are many particular sects governed by particular laws applicable to them specially, and distinguishes it on the ground that these special laws are not laws of their own enactment, but are merely parts of the law of the governing community or supreme power. The supposed distinction does not exist. In Egypt it is part of the law of the governing community or supreme Power; in other words, it is part of the law of Egypt that English residents are governed by English law and that they are amenable in certain cases only to English Courts established by the King of England with the consent of the Egyptian Government. Chitty J. puts the case of a citizen of the United States who attaches himself to the British community at Shanghai, and says that, according to the petitioner's argument, he would acquire an Anglo-Chinese domicile, and this he treats as a *reductio ad absurdum* of the petitioner's contention. A citizen of the

United States resident permanently in Shanghai would be subject to the law which attaches to citizens of the United States so settling in China according to the law of China. His domicile and the law applicable would not arise from attaching himself to any particular community but from his personal residence in Shanghai coupled with his nationality. His having attached himself, whatever that may denote, to the English community would be immaterial unless he had acquired English nationality.

I think that the respondent's counsel were entitled to treat *In re Tootal's Trusts* as a decision in their favour of the point now in dispute; and, indeed, I do not think that this was contested by Mr. Wallace. But the decision is, of course, not binding upon this House, and it is, in my opinion, erroneous. There has been no such general acquiescence in the correctness of the decision in *In re Tootal's Trusts*, and change of position in reliance upon that decision, as to render it improper that this House should act upon its own view of the law.

The case of *Abd-ul-Messih v. Farra*, 13 App. Cas. 431, came before the Judicial Committee of the Privy Council in 1887 on an appeal from the Supreme Consular Court at Constantinople. The question related to the succession to a person who had died in Egypt. The deceased was born at Baghdad, in the Ottoman dominions, of Ottoman parents, and in early life went to India, whence, after a considerable period, he went to Jedda, which was also in the dominions of the Porte. In 1858 he went to Cairo, where he remained until his death, under the protection of the British Government. Proceedings were taken in the Consular Court by his widow to obtain probate of his will, which was in the English form. The judge found that the testator died domiciled in the Ottoman Empire, that his domicile of origin was there, and that he was a member of the Chaldean Catholic community, and decreed that the law of Turkey governing the succession to a member of the Chaldean Catholic community in Ottoman dominions should be followed in distributing the effects of the deceased. From this order an appeal was brought by the widow to His Majesty in Council. In support of the appeal two arguments were put forward. First, that English law should apply to the succession of the deceased as a British protected person; and second, that the deceased was affiliated to the community of persons under English jurisdiction at Cairo, who formed as it were, an extra-territorial colony of the Crown, and that subjection to the jurisdiction of the Consular Court is

equivalent to residence in the country to which these Courts belong, so as to establish a domicile in that country. The nature of these contentions must be borne in mind in order to appreciate the terms of the judgment. What the Judicial Committee decided was that the testator was not a British subject, and that the fact that he was a person under British protection resident in Egypt did not render English law applicable to his succession.

The judgment was delivered by Lord Watson, who points out 13 App. Cas. 439-441, that the idea of domicile, independent of locality, and arising simply from membership of a privileged society, is not reconcilable with any of the numerous definitions of domicile to be found in the books. He goes on to say: "Their Lordships are satisfied that there is neither principle nor authority for holding that there is such a thing as domicile arising from society, and not from connection with a locality. In *re Tootal's Trusts* is an authority directly in point, and their Lordships entirely concur in the reasoning by which Mr. Justice Chitty supported his decision in that case." I concur with the proposition that there is no such thing as domicile independent of locality. Residence in a particular locality is of the very essence of domicile, and the contention put forward by the appellant in *Abd-ul-Messih's Case* that subjection to the jurisdiction of the Consular Courts is equivalent to residence in the country to which these Courts belong, so as to establish domicile in that country, was preposterous. On the assumption that the deceased *Adb-ul-Messih* was domiciled in Egypt in virtue of permanent residence there, then if he had become in fact a British subject, the law applicable to British subjects resident in Egypt would have applied in his case. Mere association with the British in Egypt could not have that effect. If Chitty J. in *In re Tootal's Trusts* had merely decided that there is no such thing as domicile arising from society, and not from connection with a locality, the decision would have been beyond criticism. It went, I think, a great deal further, and I find myself unable to agree with the judgment of Chitty J. in that case, or with Lord Watson's approval of his reasoning, an approval which was in no way necessary for the decision of the case before the Judicial Committee.

Lord Watson gives a statement as to the position of foreigners in Egypt in the following terms: "Certain privileges have been conceded by treaty to residents in Egypt, whether sub-

jects of the Queen or foreigners, whose names are duly inscribed in the register kept for that purpose at the British Consulate. They are amenable only to the jurisdiction of our Consular Courts in matters civil and criminal; and they enjoy immunity from territorial rule and taxation. They constitute a privileged society; living under English law, on Egyptian soil, and independent of Egyptian Courts and tax-gatherers." This description is not in accordance with the evidence in the case now before your Lordships, and I cannot help thinking that it is due to some misconception of the evidence in the *Abd-ul-Messih Case*. Foreigners residing in Egypt have, since 1875, been subject to the jurisdiction of Mixed Courts, which are Egyptian tribunals administering Egyptian law, and in certain cases to their own Consular Courts, and they are subject to Egyptian taxation. If the facts as to the position of foreigners in Egypt had been correctly appreciated it would have been impossible for the appellant to put forward the contention which Lord Watson summarizes as follows: "The appellant maintained that a community of that description ought, for all purposes of domicile, to be regarded as an ex-territorial colony of the Crown; and that permanent membership ought to carry with it the same civil consequences as permanent residence in England, or in one of the colonial possessions of Great Britain, where English law prevails."

The appellant in *Abd-ul-Messih's Case* appears also to have argued that the effect of the Order in Council was that English law is the sole criterion by which, in the case not only of British subjects, but also of persons under British protection resident in Egypt at the time of their decease, the capacity to make a will, and its validity when made, must be determined. This argument was dismissed, and rightly dismissed, by Lord Watson as wholly unsustainable on the construction of the Order in Council. 13 App. Cas. 441, 443. A further and alternative contention was advanced by the appellant's counsel in that case to the effect that the deceased had lost his Turkish nationality and had become a subject of the Queen. It is pointed out in the judgment, that it was clear that the deceased was not, in the sense of English law, a subject of Her Majesty, and that he did not possess that status within the meaning of the Order, which expressly enacts that it must be attained either by birth or naturalisation.

With reference to a contention that by an Order not appealed

against the jurisdiction of the Consular Court had been sustained in respect of the "deceased having acquired the status of a protected British subject," and that this was decisive that the deceased had acquired that status of a protected British subject, Lord Watson pointed out that this expression does not occur in the order, and has no technical meaning, and that it must be understood as meaning merely that the deceased had *de facto* enjoyed the same measure of protection as that which is accorded by treaty to British subjects in the Dominions of the Porte. This, of course, is very different from his having become a British subject. The appellant, however, argued that in point of Turkish law the deceased would be regarded as a British subject, in virtue of the protection which he enjoyed. There was a conflict of evidence between the legal experts on this point, and the Judicial Committee did not think it necessary to decide what was the position of the deceased in this respect by the law of Turkey, for the reason stated in the following sentence of the judgment: "If it be assumed that, in consequence of his having placed himself under foreign protection, the Porte resigned the deceased, both civilly and politically, to the law of the protecting Power, that would merely give him the same rights as if his nationality had been English, and the territorial law of his domicile would still be applicable to his capacity to make a will, and to the distribution of his estate." It may be observed, however, that if his nationality had been, in fact, English, and his domicile was in Egypt, the English law would, for the reasons I have given in the earlier part of this judgment, have applied to his capacity to make a will and to the distribution of his estate. The true justification for the course taken by the Judicial Committee in treating the opinion of the legal experts as to Turkish law as irrelevant is that the deceased was not, in point of English law, a British subject, and that it was quite immaterial whether the Porte had resigned the deceased to the Protecting Power unless that Power had accepted the resignation and treated the deceased as a British subject.

Having failed in the attempt to establish that the deceased was a British subject, the appellant asked to have a further proof for the purpose of showing that the Turkish Courts in administering the estate of a protected person in the position of the deceased would have been guided not by their own municipal law, but by the rules followed by English Courts in the case of domiciled Englishmen. Lord Watson points out that

there was no suggestion on the Record that there was any special law in Turkey as to the succession of a protected person, and that no further proof upon this point could be allowed.

The last argument advanced by the appellant in the *Abd-ul-Messih* Case was that the deceased's residence in Cairo had conferred upon him an Egyptian, as distinct from a Turkish, domicile, but it is there pointed out that it had not been shown that a domicile in Egypt, so far as regards its civil consequences, differs in any respect from a domicile in other parts of the Ottoman Dominions. It is indeed obvious that the questions arising on an Egyptian domicile in 1880 would have been substantially the same as those arising upon a domicile, say in Baghdad, where the deceased was born. Lord Watson added that residence in a foreign state as a privileged member of an extra-territorial community, although it may be effectual to destroy a residential domicile acquired elsewhere, is ineffectual to create a new domicile of choice. This proposition is a restatement of what was said in the earlier part of the judgment and for reasons which I have given in dealing with that passage I am unable to assent to it.

The decision in the *Abd-ul-Messih* Case was clearly right on the broad ground that the deceased was not a British subject, but I must with all respect express my dissent from some of the dicta which occur in the course of the judgment, for the reasons which I have given in referring to them. The correctness of the decision is in no way dependent upon these dicta.

The decision in the case of *In re Tootal's Trusts* has been a good deal canvassed. Sir Samuel Evans, that very distinguished judge whose untimely death we all deplore, sitting in the Prize Court, made some observations with regard to *In re Tootal's Trusts* which are worth quoting. In giving judgment in the case of *The Eumaeus*, November, 1915, 1 Br. & Col. P. C. 605, 615, he said: "In this case I am not called upon to express any opinion upon the question whether at the present day a British subject can acquire a civil domicile in an Oriental country like China. In *re Tootal's Trusts* may or may not be good law. It has been much criticised by jurists, and has been recently dissented from in a judgment of the Supreme Judicial Court of Maine in *Mather v. Cunningham*, 105 Maine, 326; 74 Atlantic Rep. 809. The decision in the case now before the Court does not involve that question." In the case to which Sir Samuel Evans refers (*Mather v. Cunningham*), as appears

from the report in 74 Atlantic Reporter, the only report which I have seen, the Supreme Court of Maine, sitting as the Supreme Court of Probate, allowed an appeal from an order of the Probate Court in Waldo County appointing an administrator. The Court on the appeal consisted of Emery C. J. and five other Judges. The deceased had made his home and carried on his business at Shanghai, his domicil of origin having been in Waldo County, Maine, and the question on which the case turned was whether an American can as a matter of law acquire a domicil in the province of Shanghai where, by treaty, American law is substituted for the Chinese local laws. The Supreme Court made an elaborate examination of the case of Tootal's Trusts and of many criticisms and comments which had been made on that decision, and arrived at the conclusion that its doctrine could not be supported. It was pointed out that domicil depends upon locality, and that the law of the locality attaches to the person who has acquired a domicil there, whether that law be decreed by the Supreme Power of the foreign country or is the result of treaty. They say that the "whole trend of modern authority is in opposition to the dictum advanced in *In re Tootal's Trusts*." . . . The Court . . . gave its decision in the following terms: "The Court is of the opinion that Henry J. Cunningham, the decedent, at the time of his decease, had abandoned his domicil of origin in Waldo County, and had acquired a domicil of choice in Shanghai," and the appeal was sustained. . . .

In March, 1916, in H. M. Court of Prize for Egypt sitting at Alexandria, Cator P. made the following observations in the case of *The Derfflinger* (No. 1) 3 Br. & Col. P. C. 389: "From time to time questions as to the status of British subjects in China and the Ottoman Dominions have come before our Courts, and it has been settled that no British subject can change his legal domicil, by residence in any place where the Crown has ex-territorial authority. That, as we know to our cost, owing to the great inconvenience which it has entailed upon the British community, is, I think, the effect of *In re Tootal's Trusts* approved of by the Privy Council in *Abd-ul-Messih v. Farra*. These decisions, it is true, relate only to the subtle and artificial doctrine of personal domicil which has been evolved by our civil Courts for the purpose of determining questions relating principally to probate and administration; and a legal domicil for the purpose of a Court of probate is, I need hardly say, a

very different thing from a commercial domicile for the purpose of a Prize Court. But In re Tootal's Trusts emphasises the fact that there still exist countries where, owing to fundamental differences in race and religion, Europeans do not merge in the general life of the native inhabitants, but keep themselves apart in separate communities; and where such separation is sanctioned by the exercise of ex-territorial authority I am of opinion that it is impossible for any individual to acquire a trade domicile other than that of the country to which he owes allegiance." The fact that inconvenience has resulted from a particular decision would of course be no reason for disturbing it, if sound in law. But, as in my opinion Tootal's Case and the dicta approving it are erroneous, I think that the British community in Egypt should be relieved from the inconvenience which Cator P. says has been thereby caused.

I entirely agree with the conclusion arrived at by Scrutton L. J. in his admirably reasoned judgment.

For these reasons I am of opinion that this Appeal should be allowed. . . .

Order of the Court of Appeal reversed. . . .

NOTE.—Territorial Sovereignty.—The right of a sovereign state to control all persons and things within its territorial limits has been asserted in innumerable cases. On the whole subject, see Moore, *Digest*, II, ch. vi. The principle was formulated by Chief Justice Marshall in a much-quoted passage in *The Schooner Exchange v. M'Faddon* (1812), 7 Cranch, 116, 136:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied.

One of the most important applications of the principle that a state has jurisdiction over all persons and things within its territories is in relation to aliens. Since the state controls its own territory it may exclude aliens, *Nishimura Ekiu v. United States* (1892), 142 U. S. 651; *Fong Yue Ting v. United States* (1893), 149 U. S. 698; *Musgrove v. Chun Teong Toy* (1891), 60 L. J. P. C. 28. It may also expel aliens, *United States v. Williams* (1904), 194 U. S. 279; *Tlaco v. Forbes*

(1913), 228 U. S. 549; *Attorney-General for Canada v. Cain* (1906), L. R. [1906] A. C. 542. But in exercising its right to exclude or to expel, a state must be mindful of its duties as a member of the family of nations. The political and commercial relations of nations are so close and the privilege of entrance and residence has been so freely accorded that an arbitrary exclusion or expulsion may give rise to a diplomatic claim. Because of the protection which they receive from the state under whose jurisdiction they reside, aliens owe to it a "temporary allegiance," *Calvin's case* (1608), 7 Reports, 18a; *Johnstone v. Pedlar* (1921), L. R. [1921] 2 A. C. 262; *Carlisle v. United States* (1873), 16 Wallace, 147, and must discharge many of the duties which are exacted of citizens, *Lau Ow Bew v. United States* (1892), 144 U. S. 47, 62. They are subject to the territorial law and may be punished for offenses committed against the laws under which they live, *Luke v. Calhoun County* (1875), 52 Ala. 115, 121; *Moore, Digest*, IV, 9. They are subject to taxation, even though discriminatory, *Mager v. Grima* (1850), 8 Howard, 490, and may be called upon for service in the police or the militia in the maintenance of public order, *Moore, Digest*, IV, 50, and their property within the jurisdiction may be requisitioned in order to meet the necessities of war, *Alexander v. Pfau* (1902), *Transvaal Law Reports* [1902] T. S. 155. See also *Bonfils (Fauchille)*, sec. 441; *Borchard*, ch. ii; J. H. Beale, "The Jurisdiction of Courts over Foreigners," *Harvard Law Review*, XXVI, 193, 283; *Bouvé, A Treatise on the Laws Governing the Exclusion and Expulsion of Aliens in the United States*.

By virtue of its territorial sovereignty, a state may exclude merchandise, *Butfield v. Stranahan* (1904), 192 U. S. 470; or vessels, *Patterson v. The Bark Eudora* (1903), 190 U. S. 169; or admit them on conditions, *Oceanic Steam Navigation Co. v. Stranahan* (1909), 214 U. S. 320.

The sovereignty of a state also extends to all forms of property within its territorial limits. What limitations shall be placed upon the exercise of its power over such property is primarily a question of municipal law, but the existence of the power is universally recognized and provision for its exercise in the public interest is quite generally made. Besides seizure by way of reprisal, which rests upon a different basis, three situations should be distinguished: the power of the state (1) over the property of its nationals, (2) over the property of aliens in time of peace, and (3) over the property of neutral aliens in time of war. The power of the state to control the property of its nationals is not questioned. For Great Britain see *In re A Petition of Right* (1915), L. R. [1915] 3 K. B. 649, where the extent to which the King may use his prerogative in defense of the realm is fully discussed, and *The Broadmayne* (1916), L. R. [1916] P. 64. The power to requisition the property of subjects by virtue of the royal prerogative in a time of national emergency is not confined, in the words of the Earl of Reading, to "such a state of things existing that unless the prerogative is invoked the nation will succumb." It is sufficient if there is "an urgent necessity for taking extreme steps for the protection of the Realm." *Crown of Leon (Owners) v. Admiralty Commissioners* (1920), L. R. [1921] 1

K. B. 595, 604. In *The Antares* (1915), 1 Br. & Col. Prize Cases, 261, the application of the Crown to requisition certain neutrally-owned copper in the custody of the Prize Court was denied. The prize proceedings were then abandoned and the copper, being within the territorial jurisdiction, was requisitioned under the common law powers of the Crown without question. See Lord Birkenhead's argument for the Crown in *The Zamora* (1916), L. R. [1916] 2 A. C. 77, 83. In the United States the Constitution provides that private property shall not be taken for public use without just compensation, thus implying that it may be taken if compensation is given. If the property taken is land, no question is raised as to the power of the state to take it whether it be owned by nationals or by aliens. All that is necessary is that the taking should be for a public purpose and that compensation should be made. But when the property seized is neutrally-owned personalty which may be within the limits of the state only temporarily, and the loss of which, as in the case of ships, may affect adversely not only the owner but the country of his allegiance, the right to seize it is disputed, and a distinction has been drawn between seizures of neutral property in time of peace and such seizures in time of war, and between ships and other forms of property. See note on *Jus Angariae*, *post*, 533.

Whether a state may punish an offense against its laws which was committed abroad has been the subject of many controversies, the most famous of which was the *Cutting Case*. Cutting, an American citizen, had published in Texas a newspaper article reflecting on a citizen of Mexico. When Cutting happened to be in Mexico, the victim of his attack sued him for libel and procured his arrest. The American government argued that whatever offense had been committed had occurred in Texas, while the Mexican government claimed jurisdiction over all offenses against its citizens wherever committed. The plaintiff having discontinued his suit, Cutting was released. See Professor John Bassett Moore's comprehensive *Report on Extra-territorial Crime*—the best discussion of the subject. See also *McLeod v. Attorney-General of New South Wales*, [1891] Appeal Cases, 455; *Rex v. Lynch*, [1903] 1 K. B. 444; and Moore, *Digest*, II, 225.

As to the jurisdiction of a state over leased territory, see *International Law Situations*, 1902, 28.

Domicile.—Modern facilities for communication and transportation are such that in every country there are large numbers of aliens whose residence therein is of so permanent a character that they are in most respects identified with the country. Persons in the situation described may or may not be domiciled in the country of residence. Domicile has been defined as the place where a person "has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning" (Story, *Conflict of Laws*, sec. 41), as "a residence acquired as a final abode" (Wharton, *Conflict of Laws*, sec. 21), and as "a legal home" (Beale, *Cases on the Conflict of Laws*, III, 508). A judge, apparently of Irish extraction, described a man's domicile as the place where he might be expected to be when he was not in some other place. Every per-

son must have a domicile. The domicile of origin of a legitimate child is the domicile of its father at the time of its birth, while that of an illegitimate child is that of its mother, *Urquhart v. Butterfield* (1887), 37 Ch. D. 357. The domicile of birth continues until another is obtained, *The Venus* (1814), 8 Cranch, 253, 278. In America a domicile of choice is usually held to continue until another is acquired, but the English courts hold that a domicile of choice may be abandoned without the acquisition of another, in which case the domicile of origin reverts, *Udny v. Udny* (1869), L. R. 1 H. L. 441. In order to acquire a domicile there must be both residence and intent to make the place of residence one's home, *Bell v. Kennedy* (1868), L. R. 1 H. L. (Scotch) 307. The best evidence of intent is the length of the residence, *The Harmony* (1800), 2 C. Robinson, 322, *post*, 411; *The Ann Green* (1812), 1 Gallison, 274, 284. Except in the case of the so-called Anglo-Indian domicile, *The Indian Chief* (1801), 3 C. Robinson, 12, the British courts long assumed that no length of residence by a European in an oriental country could effect such a merging in the community as would result in the acquisition of a civil domicile, *Re Tootal's Trusts* (1883), 23 Ch. Div. 532; *Abd-ul-Messih v. Farra* (1887), 13 A. C. 431; *Abdallah v. Rickards* (1884), 4 T. L. R. 622; *The Lützow* (Egypt, 1915), 1 Br. & Col. P. C. 528; but *contra*, *Mather v. Cunningham* (1909), 105 Maine, 326. The American decision, which has now been followed in Great Britain, is more in harmony with the opinion and conditions of the present. The decision in *Casdagli v. Casdagli* [1919] A. C. 145 is discussed in notes in *Harvard Law Review*, XXXII, 482, *Yale Law Journal*, XXVIII, 810, and *Michigan Law Review*, XVII, 694. See also Huberich, "Domicile in Countries Granting Extraterritorial Privileges to Foreigners," *Law Quarterly Review*, XXIV, 440. Domicile does not necessarily either confer or forfeit citizenship, although in fact it is usually a prerequisite to naturalization, and its acquisition in another country may be made the ground for forfeiture of citizenship. The distinction between domicile and residence is discussed in *Williams v. Commonwealth* (1914), 116 Va. 272, 9 Va. Ap. 86, and in *Cooper's Adm'r. v. Commonwealth* (1917), 121 Va. 338, 14 Va. Ap. 277.

As to commercial domicile as distinguished from civil or personal domicile, see the note, *post*, 428.

Aerial Jurisdiction.—A new topic in international law which the progress of recent invention has made of much importance is aerial jurisdiction. At least as far back as the reign of Edward I, 1272-1307, the ownership of land has been held in England to extend to an indefinite distance both upward and downward in accordance with the maxim *Cujus est solum ejus usque ad coelum et ad inferos*, *Bury v. Pope* (1588), *Croke, Elizabeth*, 118. In *Pickering v. Rudd* (1815), 4 Campbell, 219, Lord Ellenborough expressed some doubt as to whether this principle still obtained. "It would follow," he said, "that an aeronaut is liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage." Later judges, however, have not allowed themselves to be frightened away from what they regard as an estab-

lished rule by the prospect of undesirable consequences, and the rule has been applied in numerous cases, e. g. *Corbett v. Hill* (1870), L. R. 9 Eq. 671; *Finchley Electric Light Co. v. Finchley Urban Council* (1903), L. R. 1 Ch. Div. 437. It has also been recognized by many American courts. See *Murphy v. Bolger Brothers* (1888), 60 Vt. 723; *Hannabalsen v. Sessions* (1902), 116 Iowa, 457; *Puoroto v. Chieppa* (1905), 78 Conn. 401; *Butler v. Frontier Telephone Co.* (1906), 186 N. Y. 486. Since the air space is treated as part of the subjacent land, any unpermitted intrusion therein is a trespass, *Guille v. Swan* (1822), 19 Johnson (N. Y.), 381; *Esty v. Baker* (1860), 48 Maine, 495; *Ellis v. Loftus Iron Co.* (1874), L. R. 10 C. P. 10.

The rule of the English common law as to the ownership of land up to the sky became established before the advent of the dirigible airship and the wireless telegraph, when there was no effective means of occupying the adjacent air space except by structures resting upon the earth. If that rule is to be continued, the practical difficulty suggested a hundred years ago by Lord Ellenborough, namely that every aeronaut who passes over a field becomes a trespasser therein, will operate as a serious handicap to the development of the usefulness of air craft. On the other hand the dirigible airship now makes it easy to invade the privacy of the occupant of the land to an extent never before possible, and necessarily endangers his physical safety by objects falling from air craft or by the falling of the air craft themselves. Here is a conflict of interests which in Anglo-American jurisdictions has not yet been reconciled. In other jurisdictions there is a widespread recognition of rights in the air in derogation of the rights of the subjacent proprietor. The Japanese Civil Code, sec. 207, provides:

The ownership of land, subject to restrictions imposed by law or regulations, extends above and below the surface.

Provisions of a similar kind are found in the Civil Codes of France, Holland, Germany, Austria, Italy, Switzerland, Spain and Portugal.

In international law the question of aerial jurisdiction is as yet without authoritative determination. Among publicists the great weight of authority is in favor of the opinion that whatever the rights of a private owner of land in the air space above his land may be, a state must possess the same jurisdiction over the air space above its territory that it possesses over the territory itself. To admit the contrary would subject the state to dangers that could not be tolerated and would make impossible the enforcement of some of its laws. During the Great War the belligerents quite commonly assumed control of the air space above their territories and regulated its use. As a war measure, President Wilson, by his proclamation of Feb. 28, 1918, required that civilian aircraft should obtain a license in order to fly in any zone of war-like operations or preparation, and declared "the whole of the United States and its territorial waters and of the insular possessions and the Panama Canal Zone" to be included in that description. The advance made in aeronautics during the war emphasizes the need of regulation not only for purposes of defense but also in order to promote the commercial use of aircraft.

The subject will be of particular interest to such states as Switzerland, Czecho-Slovakia and Bolivia, which have no sea coast.

One of the important by-products of the Peace Conference of 1918-1919 was the signature by some of the Allied Powers in October, 1919, of the International Flying Convention. This agreement is based on the principle that each state possesses exclusive sovereignty of all space above its territories, but is under obligation to permit its innocent use in time of peace by citizens of all the signatory powers, *Senate Doc. No. 91, 66th Congress, 1st Session; Harvard Law Review, XXXIII, 23.*

If a state may regulate the use of its air space by flying craft, it may also regulate its use for the transmission of radio messages. See the radio convention adopted at London in 1912 in Charles, *Treaties and Conventions, I, 185.*

For discussions of aerial jurisdiction from the standpoint of international law, see Hazeltine, *The Law of the Air*; Sir H. Erle Richards, *Sovereignty Over the Air*; Nijeholt, *Air Sovereignty*; Meili, *Das drahtlose Telegraphie*; Spaight, *Aircraft in War and Aircraft in Peace and the Law*; Fauchille, *Le Domain Aérien et le Régime Juridique des Aérostats*; *La Revue Juridique Internationale de la Locomotion Aérienne*, four volumes; *International Law Situations, 1907*, 138 (wireless telegraph); *Ib. 1912*, 56 (Aircraft in war); Hershey, *Essentials*, chs. xv and xxviii; Phillipson, *Two Studies in International Law*, 104; Phillipson, *International Law and the Great War*, 314; Wilson, *Handbook*, 87-90, 120-124; Hyde, I, 324; Bonfils (Fauchille), sec. 531²; de Montmorency, "Air Space Above Territorial Waters," *Journal of Society of Comparative Legislation* (2d series), XVII, 172; Hazeltine, "The Law of Civil Aerial Transport," *Ib.* (3d series), I, 76, and "International Air Law in Time of Peace," *International Law Association, Twenty-ninth Report*, 387; "Report of the Aerial Law Committee," *Ib. Reports for 1913-15*, 218; Zollmann, "Air Space Rights," *American Law Review*, LIII, 711, and "Liability of Aircraft," *Ib.* LIII, 879; Bellot, "Sovereignty of the Air," *International Law Notes*, III, 133; Baldwin, "The Law of the Air-Ship," *Am. Jour. Int. Law*, IV, 95; Kuhn, "The Beginnings of an Aerial Law," *Ib.* IV, 109, and "International Aerial Navigation and the Peace Conference," *Ib.* XIV, 369; Lee, "Sovereignty of the Air," *Ib.* VII, 470, and "The International Flying Convention," *Harvard Law Review, XXXIII, 23*; Wilson, "Aerial Jurisdiction," *Am. Pol. Sci. Rev.*, V, 171; "Trespass by Airplane," *Harvard Law Review, XXXII, 569*. For a valuable judicial discussion of aerial jurisdiction for police purposes, see the opinion of Mr. Justice Holmes in *Georgia v. Tennessee Copper Co. (1907)*, 206 U. S. 230.

SECTION 2. JURISDICTION OVER BOUNDARY RIVERS.

LOUISIANA v. MISSISSIPPI.

SUPREME COURT OF THE UNITED STATES. 1906.
202 U. S. 1.

Original. In equity.

The State of Louisiana by leave of court filed her bill against the State of Mississippi, October 27, 1902, to obtain a decree determining a boundary line between the two States and requiring the State of Mississippi to recognize and observe the line so determined. . . .

MR. CHIEF JUSTICE FULLER . . . delivered the opinion of the court. . . .

The State of Louisiana was admitted into the Union by the act of Congress approved April 6, 1812, 2 Stat. 701, c. 50, which commenced as follows:

"Whereas, the representatives of the people of all that part of the territory or country ceded under the name of 'Louisiana' by the treaty at Paris on the thirtieth day of April, one thousand eight hundred and three, between the United States and France, contained within the following limits, that is to say: Beginning at the mouth of the river Sabine; thence, by a line to be drawn along the middle of said river, including all islands, to the thirty-second degree of latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence, down the said parallel of latitude to the river Mississippi; thence, down the said river, to the river Iberville; and from thence, along the middle of the said river, and Lakes Maurepas and Pontchartrain, to the Gulf of Mexico; thence, bounded by the said Gulf, to the place of beginning, including all islands within three leagues of the coast;" . . .

If the doctrine of the *thalweg* is applicable, the correct boundary line separating Louisiana from Mississippi in these waters is the deep water channel.

The term "*thalweg*" is commonly used by writers on international law in definition of water boundaries between States, meaning the middle or deepest or most navigable channel. And while often styled "*fairway*" or "*midway*" or "*main channel*," the word itself has been taken over into various languages.

Thus in the treaty of Luneville, February 9, 1801, we find "le Thalweg de l'Adige," "le Thalweg du Rhin," and it is similarly used in English treaties and decisions, and the books of publicists in every tongue.

In *Iowa v. Illinois*, 147 U. S. 1, the rule of the thalweg was stated and applied. The controversy between the States of Iowa and Illinois on the Mississippi river, which flowed between them, was as to the line which separated "the jurisdiction of the two States for the purposes of taxation and other purposes of government." Iowa contended that the boundary line was the middle of the main body of the river, without regard to the "steamboat channel" or deepest part of the stream. Illinois claimed that its jurisdiction extended to the channel upon which commerce on the river by steamboats or other vessels was usually conducted. This court held that the true line in a navigable river between States is the middle of the main channel of the river.

Mr. Justice Field, delivering the opinion of the court, said:

"When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term 'middle of the stream,' as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France, and Spain, concluded at Paris in 1763. By the language, 'a line drawn along the middle of the river Mississippi from its source to the river Iberville,' as there used, is meant along the middle of the channel of the river Mississippi."

This judgment related to navigable rivers. But we are of opinion that, on occasion, the principle of the thalweg is applicable, in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries and other arms of the sea.

As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different States; but whenever there is a deep water sailing channel therein, it is thought by the publicists that the rule of the *thalweg* applies. 1 Martens (F. de), 2d ed. 134; Hall, sec. 38; Bluntschli, 5th ed. secs. 298, 299; 1 Oppenheim, 254, 255.

Thus Martens writes: "What we have said in regard to rivers and lakes is equally applicable to the straits or gulfs of the sea, especially those which do not exceed the ordinary width of rivers or double the distance that a cannon can carry."

So Pradier Fodéré says (Vol. 11, p. 202), that as to lakes, "in communication with or connected with the sea, they ought to be considered under the same rules as international rivers."

The same view is confirmed by decisions of this court and of many arbitral tribunals.

In *Devoe Manufacturing Company*, 108 U. S. 401, the question at issue was in regard to the boundary line between New York and New Jersey under an agreement between the two States. The jurisdiction of the State of New Jersey was claimed "to extend down to the bay of New York, and to the channel midway of said bay," and this court sustained the claim. See *Hamburg American Steamship Company v. Grube*, 196 U. S. 407.

In the San Juan Water Boundary controversy between the United States and Great Britain, Emperor William I gave the award in favor of the United States, October 21, 1871, by deciding "that the boundary line between the territory of Her Britannic Majesty and the United States should be drawn through the Haro Channel;" and it is apparent that the decision was based on the deep channel theory as applicable to sounds and arms of the sea, such as the straits of San Juan de Fuca; indeed in a subsequent definition of the boundary, signed by the Secretary of State, the British Minister, and the British representative, the boundary line was said to be prolonged until it "reaches the center of the fairway of the Straits of San Juan de Fuca." The fairway was the equivalent of the *thalweg*.

Again, in fixing the boundary line of the Detroit river, under the sixth and seventh articles of the treaty of Ghent, the deep water channel was adopted, giving Belle Isle to the United States as lying north of that channel.

So in the Alaskan Boundary case, the majority of the arbitration tribunal, made up of Baron Alverstone, Lord Chief Justice of England, Mr. Secretary Root, and Senators Lodge and Turner, held that the middle of the Portland Channel was the proper boundary line and included Wales Island, to the north of which the channel passed. This sustained the American contention in regard to the thalweg and the island lying south of it. . . .

In such circumstances as exist in the present case, we perceive no reason for declining to apply the rule of the thalweg in determining the boundary. . . .

Our conclusion is that complainant is entitled to the relief sought.

Decree accordingly.

STATE OF ARKANSAS v. STATE OF TENNESSEE.

SUPREME COURT OF THE UNITED STATES. 1913.
246 U. S. 158.

This is an original suit in equity brought by the State of Arkansas against the State of Tennessee for the purpose of determining the location of the boundary line between those States along that portion of the bed of the Mississippi River that was left dry as the result of an avulsion which occurred March 7, 1876, when a new channel was formed known as the "Centennial Cut-off." . . .

[In the Treaty of Paris of 1763 and in the Treaty of Peace between Great Britain and the United States, 1783, the boundary between the territories on opposite sides of the Mississippi is declared to be a line drawn along the middle of the Mississippi. In the treaty by which Louisiana was ceded to the United States the boundary line was declared to be "the middle of the main channel of the said river." Evidence was offered showing the location of this line in 1823.]

On March 7, 1876, the river suddenly and with great violence, within about thirty hours, made for itself a new channel directly across the neck opposite the apex of Dean's Island, so that the old channel around the bend of the elbow (a distance of fifteen to twenty miles) was abandoned by the current, and although

it remained for a few years covered with dead water it was no longer navigable except in times of high water for small boats, and this continued only for a short time, since the old bed immediately began to fill with sand, sediment, and alluvial deposits. In the course of time it became dry land suitable for cultivation and to a considerable extent covered with timber. The new channel is called, from the year in which it originated, the "Centennial Cut-Off," and the land that it separated from the Tennessee mainland goes by the name of "Centennial Island." . . .

The following questions are submitted for the determination of this court:

(1) Arkansas contends that the true boundary line between the States (aside from the question of the avulsion of 1876) is the middle of the river at low water, that is, the middle of the channel of navigation; whereas Tennessee contends that the true boundary is a line equidistant from the well-defined banks at a normal stage of the river.

(2) Arkansas contends that by the avulsion of 1876 the boundary line between the States was unaffected, and remained in the middle of the river bed which was by the avulsion abandoned; . . . whereas Tennessee contends . . . that the effect of the avulsion was to press back the line between the two States to the middle of the old channel as it ran previous to the erosions upon the Tennessee banks that occurred between 1823 and 1876.

[On the first question the court sustained the contention of Arkansas. Only so much of the opinion is here given as relates to the second question.]

MR. JUSTICE PITNEY . . . delivered the opinion of the court. . . .

The next and perhaps the most important question is as to the effect of the sudden and violent change in the channel of the river that occurred in the year 1876, and which both parties properly treat as a true and typical avulsion. It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or

artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. *New Orleans v. United States*, 10 Pet. 662, 717; *Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 189; *Nebraska v. Iowa*, 143 U. S. 359, 361, 367, 370; *Missouri v. Nebraska*, 196 U. S. 23, 34-36.

There is controversy with respect to the application of the foregoing rule to the particular circumstances of this case. It is insisted in behalf of the State of Tennessee that since the rule of the thalweg derives its origin from the equal rights of the respective States in the navigation of the river, the reason for the rule and therefore the rule itself ceases when navigation has been rendered impossible by the abandonment of a portion of the river bed as the result of an avulsion. In support of this contention we are referred to some expressions of Vattel, Almeda, Moore, and other writers; but we deem them inconclusive, and are of the opinion, on the contrary, that the contention runs counter to the settled rule and is inconsistent with the declarations of this court, in *Nebraska v. Iowa*, 143 U. S. 359, 367, that "avulsion would establish a fixed boundary, to wit: the centre of the abandoned channel," or, as it is expressed on page 370, "the boundary was not changed, and it remained as it was prior to the avulsion, the centre line of the old channel," and in *Missouri v. Nebraska*, 196 U. S. 23, 36, that the boundary line "must be taken to be the middle of the channel of the river as it was prior to such avulsion."

It is contended, further, that since the avulsion of 1876 caused the old river bed to dry up, what is called "the doctrine of the submergence and reappearance of land" must be applied, so as to establish the ancient boundary as it existed at the time of the earliest record, in this case the year 1823, with the effect of eliminating any shifting of the river bed that resulted from the erosions and accretions of the half century preceding the avulsion.

This contention is rested chiefly upon a quotation from Sir Matthew Hale, *De Jure Maris*, c. 4: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by situation and

extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety; and accordingly it was held by Cooke and Foster, M. 7 Jac. C. B., though the inundation continue forty years." (1 Hargraves' Law Tracts, 15; Note to *Ex parte Jennings*, 6 Cow. 542.) To the same effect, 2 Roll. Abr. 168, 1, 48; 7 Comyns' Dig., tit. Prerogative, D. 61, 62; 5 Bacon's Abr., tit. Prerogative, B. 1. A reference to the context shows that the portion quoted is a statement of one of several exceptions to the general rule that any increase of land *per relictionem*, or sudden recession of the sea, belonged of common right to the King as a part of his prerogative. It amounts to no more than saying that where the reliction did but restore that which before had been private property and had been lost through the violence of the sea, the private right should be restored if the land is capable of identification. Such a case was *Mulry v. Norton*, 100 N. Y. 424, the true scope of which decision was pointed out in *In re City of Buffalo*, 206 N. Y. 319, 326, 327. But this doctrine has no proper bearing upon the rule we have stated with reference to boundary streams. Certainly it cannot be regarded as having the effect of carving out an exception to the rule that where the course of the stream changes through the operation of the natural and gradual processes of erosion and accretion, the boundary follows the stream; while if the stream leaves its former bed and establishes a new one as the result of an avulsion, the boundary remains in the middle of the former channel. An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion. The emergence of the land, however, may or may not follow, and it ought not in reason to have any controlling effect upon the location of the boundary line in the old channel. To give to it such an effect is, we think, to misapply the rule quoted from Sir Matthew Hale. . . .

Upon the whole case we conclude that the questions submitted for our determination are to be answered as follows:

(1) The true boundary line between the States, aside from the question of the avulsion of 1876, is the middle of the main channel of navigation as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

(2) By the avulsion of 1876 the boundary line between the States was unaffected, and remained in the middle of the former main channel of navigation, as above defined.

(3) The boundary line should now be located according to the middle of that channel as it was at the time the current ceased to flow therein as a result of the avulsion of 1876.

(4) A commission consisting of three competent persons, to be named by the court upon the suggestion of counsel, will be appointed to run, locate, and designate the boundary line between the States at the place in question in accordance with the above principles.

(5) The nature and extent of the erosions and accretions that occurred in the old channel prior to its abandonment by the current as a result of the avulsion of 1876, and the question whether it is practicable now to locate accurately the line of the river as it then ran, will be referred to said commission, subject to a review of its decision by this court if need be.

The parties may submit the form of an interlocutory decree to carry into effect the above conclusion.

NOTE.—See also *Handly's Lessee v. Anthony* (1820), 5 Wheaton, 374; *Howard v. Ingersoll* (1852), 13 Howard, 381; *Jones v. Soulard* (1861), 24 Howard, 41; *Indiana v. Kentucky* (1890), 136 U. S. 479; *Keokuk & Hamilton Bridge Co. v. Illinois* (1900), 175 U. S. 626; *Morgan v. Reading* (1844), 3 Sm. & Marsh (Miss.) 366; *St. Joseph & G. I. Ry. v. Devereaux* (1889), 41 Fed. 14. If a river possesses more than one channel, the thalweg is the one habitually followed by vessels of the largest tonnage even though it is not the deepest, *Minnesota v. Wisconsin* (1920), 252 U. S. 273. There is a full citation of authorities in the brief of complainant's counsel in *Louisiana v. Mississippi* (1906), 202 U. S. 1, 25. See also *Bonfils (Fauchille)*, sec. 520; *Hyde*, I, 243; *Moore, Digest*, I, 616.

Should accretion, erosion or other natural causes produce gradual and imperceptible changes in the main channel of a stream, the boundary line shifts accordingly, *New Orleans v. United States* (1836), 10 Peters, 662, 717; *Nebraska v. Iowa* (1892), 143 U. S. 359; *Philadelphia Company v. Stimson* (1912), 223 U. S. 605, 625; *McBaine v.*

Johnson (1900), 155 Mo. 191; *Buttenuth v. St. Louis Bridge Co.* (1888), 123 Ill. 535; *Bellefontaine Improvement Co. v. Niedringhaus* (1899), 181 Ill. 426; but if the change is sudden the boundary continues where it was, *Cooley v. Golden* (1893), 52 Mo. App. 229; *Missouri v. Nebraska* (1904), 196 U. S. 23. As to the consequences following the recession of a lake, see *Murray v. Sermon* (1820), 1 Hawks (N. C.), 56. The development of a new and more important channel, the first one still continuing in its old location, does not affect the boundary, *Washington v. Oregon* (1908), 211 U. S. 127, same case on re-hearing, (1909), 214 U. S. 205. If an island should be formed suddenly in a river, the riparian sovereigns might fairly claim an equal division thereof, but if formed gradually it is the property of the state in whose waters it lies, *St. Louis v. Rutz* (1891), 138 U. S. 226. When a river forms a boundary between two countries and the only access to adjacent territories is through that river, the waters of the whole must be considered as common to both nations for all purposes of navigation as a common highway, *The Twee Gebroeders* (1800), 3 C. Robinson, 336; *The Apollon* (1824), 9 Wheaton, 362. The same principle applies to lakes which are boundaries, *United States v. Rodgers* (1893), 150 U. S. 249. Where a river forms the boundary between two States of the American Union, Congress sometimes gives to them concurrent jurisdiction over the entire river, *Wedding v. Meyler* (1904), 192 U. S. 573, *Nielsen v. Oregon* (1909), 212 U. S. 315, and an excellent note, "Concurrent Jurisdiction of States over Boundary Waters," *Harvard Law Review*, XXII, 599. This is a revival of a practice once common in Europe, See Nys, *Droit International*, I, 423, cited in Hyde, I, 243.

On the status of such rivers as the Rhine, the Danube, the St. Lawrence and the Amazon, which may not only be boundaries but which may be of interest to several countries from the standpoint of navigation, see Engelhardt, *Du Régime Conventionnel des Fleuves Internationaux*; Eysinga, *Évolution du Droit Fluvial International du Congrès de Vienna au Traité de Versailles*; Kaeckenbeeck, *International Rivers*, and Ogilvie, *International Waterways*.

SECTION 3. JURISDICTION OVER MARGINAL SEAS.

THE ANNA.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1805.
5 C. Robinson, 373.

This was the case of a ship under American colors, with a cargo of logwood, and about 13,000 dollars on board, bound from the Spanish main to New Orleans, and captured by the *Minerva* privateer near the mouth of the River Mississippi. A claim was given under the direction of the American Ambassador [Min-

ister] for the ship and cargo, "as taken within the territory of the United States, at the distance of a mile and a half from the western shore of the principal entrance of the Mississippi, and within view of a post protected by a gun, and where is stationed an officer of the United States." . . .

SIR WILLIAM SCOTT [LORD STOWELL]: . . .

When the ship was brought into this country, a claim was given of a grave nature, alledging a violation of the territory of the United States of America. This great leading fact has very properly been made a matter of much discussion, and charts have been laid before the Court to shew the place of capture, though with different representations from the adverse parties. The capture was made, it seems, at the mouth of the River Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is "*terrae dominium finitur, ubi finitur armorum vis*," and since the introduction of fire-arms, that distance has usually been recognized to be about three miles from the shore. But it so happens in this case, that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the River, which form a kind of portico to the main-land. It is contended that these are not to be considered as any part of the territory of America, that they are a sort of "no mans land," not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds nests. It is argued that the line of territory is to be taken only from the Balise, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border, and from which, indeed, they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod vis fluminis de tuo prædio detraxerit, & vicino prædio attulerit, palam tuum remanet*, (Inst. L. 2. Tit. 1, § 21), even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the mainland, and as comprized within the bounds of territory. If they do not belong to the United States of

America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the River would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to shew, that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied that the actual capture took place within the distance of three miles from the islands, and at the very threshold of the river. But it is said that the act of capture is to be carried back to the commencement of the pursuit, and that if a contest begins before, it is lawful for a belligerent cruizer to follow, and to seize his prize within the territory of a neutral State. And the authority of Bynkershoek is cited on this point. True it is, that that great man does intimate an opinion of his own to that effect; but with many qualifications, and as an opinion, which he did not find to have been adopted by any other writers. I confess I should have been inclined to have gone along with him, to this extent, that if a cruizer, which had before acted in a manner entirely unexceptionable, and free from all violation of territory, had summoned a vessel to submit to examination and search, and that vessel had fled to such places as these, entirely uninhabited, and the cruizer had without injury or annoyance to any person whatever, quietly taken possession of his prey, it would be stretching the point too hardly against the captor, to say that on this account only it should be held an illegal capture. If nothing objectionable had appeared in the conduct of the captors before, the mere following to such a place as this is, would I think not invalidate a seizure otherwise just and lawful.

But that brings me to a part of the case, on which I am of opinion that the privateer has laid herself open to great reprehension. Captors must understand, that they are not to station themselves in the mouth of a neutral River, for the purpose of exercising the rights of war from that River, much less in the very River itself. It appears from the Privateer's own log-book that

this vessel has done both; and as to any attempt to shelter this conduct under the example of King's ships, which I do not believe, and which, if true, would be no justification to others, captors must I say be admonished, that the practice is altogether indefensible, and that if King's ships should be guilty of such misconduct, they would be as much subject to censure as other cruizers. It is unnecessary to go over all the entries in the log. The captors appear by their own description to have been standing off and on, obtaining information at the Balise, overhauling vessels in their course down the River, and making the River as much subservient to the purposes of war, as if it had been a river of their own country. This is an inconvenience which the States of America are called upon to resist, and which this Court is bound on every principle to discourage and correct. . . .

The conduct of the captors has on all points been highly reprehensible. Looking to all the circumstances of previous misconduct, I feel myself bound to pronounce, that there has been a violation of territory, and that as to the question of property, there was not sufficient ground of seizure; and that these acts of misconduct have been further aggravated, by bringing the vessel to England, without any necessity that can justify such a measure. In such a case it would be falling short of the justice due to the violated rights of America, and to the individuals who have sustained injury by such misconduct, if I did not follow up the restitution which has passed on the former day, with a decree of costs and damages.

MORTENSEN v. PETERS.

HIGH COURT OF JUSTICIARY OF SCOTLAND. 1906.
14 Scots Law Times Reports, 227.

[The facts and the first part of the opinion are printed, *ante*, 29.]

THE LORD JUSTICE GENERAL. . . . I do not think I need say anything about what is known as the three-mile limit. It may be assumed that within the three miles the territorial sovereignty would be sufficient to cover any such legislation as the present. It is enough to say that that is not a proof of the

counter proposition that outside the three miles no such result could be looked for. The locus, although outside the three-mile limit, is within the bay known as the Moray Firth, and the Moray Firth, says the respondent, is *intra fauces terrae*. Now, I cannot say that there is any definition of what *fauces terrae* exactly are. But there are at least three points which go far to shew that this spot might be considered as lying therein.

1st. The dicta of the Scottish Institutional Writers seem to show that it would be no usurpation, according to the law of Scotland, so to consider it.

Thus, Stair, II, i. 5: "The vast ocean is common to all mankind as to navigation and fishing, which are the only uses thereof, because it is not capable of bounds; but when the sea is inclosed in bays, creeks, or otherwise is capable of any bounds or meiths as within the points of such lands, or within the view of such shores, then it may become proper, but with the reservation of passages for commerce as in the land." And Bell, Pr. Sec. 639: "The Sovereign . . . is proprietor of the narrow seas within cannon shot of the land, and the *firths*, gulfs, and bays around the Kingdom."

2nd. The same statute puts forward claims to what are at least analogous places. If attention is paid to the Schedule appended to section 6, many places will be found far beyond the three-mile limit—e. g., the Firth of Clyde near its mouth. I am not ignoring that it may be said that this in one sense is proving *idem per idem*, but none the less, I do not think the fact can be ignored.

3rd. There are many instances to be found in decided cases where the right of a nation to legislate for waters more or less landlocked or landembraced, although beyond the three-mile limit, has been admitted. . . .

It seems to me therefore, without laying down the proposition that the Moray Firth is for every purpose within the territorial sovereignty, it can at least be clearly said that the appellant cannot make out his proposition that it is inconceivable that the British legislature should attempt for fishery regulation to legislate against all and sundry in such a place. And if that is so, then I revert to the considerations already stated which as a matter of construction make me think that it did so legislate. . . .

NOTE.—The question as to how far the jurisdiction of a state may be exercised over the seas adjacent to its shores may be approached

from the standpoint of the state whose jurisdiction is in question, in which case the point is primarily one of domestic policy and is determined by reference to the needs of the state and to its willingness to assume responsibility for the maintenance of order in the waters over which it claims jurisdiction. It may also be approached from the standpoint of the whole society of nations every member of which has rights in the high seas which are infringed upon by every extension of the jurisdiction of a littoral state. The three-mile rule represents a compromise between these conflicting viewpoints. It is obvious that for its own protection as well as for the maintenance of international peace and order, every riparian state must have jurisdiction over a portion of the adjacent seas. Because of this fact every state submits to some derogation from its own rights in the high seas.

Grotius recognized that a state has a right to control the sea adjacent to its coasts, but the distance to which that control might extend was first precisely formulated by his fellow-countryman Bynkershoek, who said in 1702, "We do not concede dominion of an adjacent sea further than that distance from the land from which it can be ruled." In other words, a state's control over the adjacent seas extends to the range of a cannon. This idea he embodied in a phrase which has become almost an aphorism,—*Terrae dominitum finitur ubi finitur armorum vis*. The first government which adopted this as a rule of international law seems to have been that of the United States, which in the administration of President Washington asserted that the dominion of this country extended one marine league from the shore. Moore, *Digest*, I, 702. This, however, seems to have been set up as a minimum claim. In 1804, Thomas Jefferson, who, as Washington's Secretary of State, had asserted the three-mile rule, said that the three-mile maritime jurisdiction should be counted from the farthest point that could be seen from land. He estimated that this point was about 25 miles distant. This rule, if applied, would give the United States jurisdiction over the maritime seas for a distance of 28 miles. In 1805 Jefferson went still further and claimed that the Gulf Stream was the natural boundary of the United States. At about the same time, the three-mile limit was recognized by Lord Stowell in *The Twee Gebroeders* (1800), 3 C. Robinson, 162, and *The Anna* (1805), 5 Ib, 373, and by Justice Story in *The Ann* (1812), 1 Gallison, 62. See also *United States v. Grush* (1829), 5 Mason, 290, 300, *Dunham v. Lamphere* (1855), 3 Gray (Mass.), 268, 270, and *Bolmer v. Edsall* (1919), 90 N. J. Eq. 299, 307. In 1818, in a treaty between Great Britain and the United States, the three-mile rule instead of the cannon-shot rule was embodied for the first time in an international agreement. Logically the principle upon which the extent of a state's maritime jurisdiction was measured required that such jurisdiction should be increased automatically as the range of cannon increased, and there have not been wanting jurists, e. g., Professor de Martens, who have so argued. But the practice of nations has not been logical, and three miles or a marine league still remains the recognized minimum limit of a state's jurisdiction.

over the high seas. Some nations claim more. Norway and Sweden assert jurisdiction up to four miles from their coasts, and Spain up to six miles, while Italy makes the distance ten miles. In the Great War however Norway announced that in view of the difficulty of maintaining neutrality in a zone which was not recognized by either Great Britain or Germany her efforts would be restricted to the three-mile limit. In this divergence of practice, the most definite statement that can be made is that a nation's right to assert its jurisdiction as far as three miles from its shore is unquestioned. There is general recognition of the desirability of extending the width of this maritime belt, but as yet no agreement has been reached.

In discussing the present status of the rule the Superior Prize Court of Berlin in *The Elida* (1915), *Entscheidungen*, 9, said:

It was originally based upon the range of ship and coast ordnance. It is true that this basis no longer obtains, but in this matter the principle *cessante ratione non cessat lex ipsa*, applies, and however numerous the various propositions and opinions concerning a different limitation of territorial waters, yet no other rule has met with the unanimous approval of maritime states. This is especially true of the opinion that each state may, of its own volition, extend its territorial waters beyond the three-mile limit, which is recognized as at least their minimum extent, to a distance equal to a cannon's range. But in view of the range of modern artillery, this would lead to absolutely untenable results, and would enable individual states to subject to their sovereignty larger areas of the open sea whose freedom is to the general interest of all maritime countries. . . . But the extension of the jurisdiction of a state does not depend upon its mere volition, but upon recognition by other states. Moreover tacit acceptance is not equivalent to positive approval by the international community. And we must further take into account that the exercise by the riparian state of certain sovereign functions, such as the control of customs and of the sanitary police, beyond the three-mile limit, although tolerated in some quarters, is in no sense an admission that such area has become subject to the jurisdiction of such state. Hence in recent treaties signed by a large number of maritime nations, as for instance in the treaty of May 2, 1882 for the policing of the North Sea fisheries, and in the treaty of October 29, 1888, concerning the neutralization of the Suez Canal, the three-mile limit was recognized as binding. According to official information from the Foreign Office, in the second sitting of the International Conference for the Protection of Submarine Cables, held in Paris October 18, 1882, the German representative, without encountering any opposition, expressly declared that territorial waters meant a zone of three nautical miles. According to similar official information, the British Government in 1911, in connection with negotiations for the holding of a conference for the settle-

ment of the question of territorial waters, positively supported the three-mile rule, and accordingly, even in the present war, it has informed the Government of Uruguay, through Admiral Craddock, that it would not recognize the claim of Uruguay and Argentina to an extension of their territorial waters beyond the three-mile limit.

In *The Rossia* (1904), 2 Hurst and Bray, 41, and in *The Michael* (1904), 2 Ib. 82, the Sasebo Prize Court of Japan declared that the marginal jurisdiction of a state extends only three miles from the shore.

The jurisdiction of a state over its marginal waters is elaborately discussed in *The Queen v. Keyn* (1876), L. R. 2 Excheq. Div. 63, in which it was held that an English court had no jurisdiction over a crime committed by a foreigner on a foreign merchant ship within three miles of the British coast. This decision has been strongly criticised and the jurisdiction which it denied was promptly conferred by act of Parliament, the preamble of which declared:

Whereas the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defense and security of such dominions, etc.

It will be noted that the principle here enunciated, the soundness of which is unquestionable, does not restrict the Crown's jurisdiction to the three-mile zone but asserts it "to such a distance as is necessary for the defense and security" of its dominions.

For a discussion of jurisdiction over straits, see *Imperial Japanese Government v. P. & O. Steamship Co.* [1895] A. C. 644, and *The Bangor* [1916] P. 181, 185.

Whether or not a bay opening from the high seas shall be treated as under the jurisdiction of the adjacent state depends not only upon the width of the opening but also upon the physical and economic relation of the bay to surrounding territory. If the opening is not more than six miles in width the bay is clearly territorial. If the opening is more than six and not more than ten miles in width, the bay will usually be treated as closed simply as a matter of practical convenience. If it were not so treated, there would be a strip in the center so narrow that it could hardly be distinguished from the territorial waters on either side and which would probably be a constant source of controversy. See the observations of John Bassett Moore in *Annuaire de l'Institut de Droit International*, 1894, 146. Some bays, which are sometimes called historical as distinguished from geographical bays, are treated as closed because of their relation to surrounding territory. The Delaware Bay, which is fifteen miles wide at the entrance, is the approach to the important port of Philadelphia, and exclusive jurisdiction over it is claimed by the United States, *The Grange* (1793), 1 *Opinions Att. Gen.* 32, Moore, *Digest*, I, 735. The Chesapeake Bay, which is twelve miles wide

at the entrance, stands in the same relation to Baltimore and is likewise under American jurisdiction, *The Alleganean* (1885), Moore, *Int. Arb.* IV, 4333, V. 4675. The great estuary of the River Plate, lying between Argentina and Uruguay, naturally falls under the jurisdiction of those countries, but since it is the approach from the sea to Paraguay their jurisdiction must be limited by the rights of that state. Conception Bay, which is about twenty miles in width at its entrance and which could be made the base of an attack on St. John, is under the jurisdiction of Newfoundland, *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877); L. R. 2 App. Cases, 394. The Gulf of Fonseca in Central America is the natural center for the development of the surrounding country and jurisdiction over it must be determined largely by that fact, *Republic of El Salvador v. Republic of Nicaragua* (1917), *Am. Jour. Int. Law*, XI, 674. A claim to jurisdiction over such waters, if based upon reasonable considerations and if long continued and undisputed, will ripen into a prescriptive right to sovereign dominion. For a valuable discussion of the status of bays with openings more than ten miles wide see the dissenting opinion of Dr. Drago in *The Proceedings of the North Atlantic Coast Fisheries Arbitration*, I, 102. See also *Regina v. Cunningham* (1859), Bell, *Crown Cases*, 72 (Bristol Channel), *Manchester v. Massachusetts* (1891), 139 U. S. 240 (Buzzards Bay), *Mahler v. Norwich & N. Y. Transportation Co.* (1866), 35 N. Y. 352 (Long Island Sound), and *The Washington* (1853), Moore, *Int. Arb.* IV, 4342, in which the Bay of Fundy, 65 to 75 miles in width, was held to be part of the high seas. In the case of *The Argus* (1854), *Ib.* IV, 4344, the headland theory was rejected when Great Britain sought to apply it to Cape Breton Island, but it was applied in *The Queen v. Delepine* (1889), 3 Morris (Newfoundland), 378. In the Behring Sea controversy, which was submitted to arbitration in 1893, the United States contended that the Behring Sea was a closed sea under the exclusive jurisdiction of the United States. In the opinion of a distinguished scholar this was "a new effort made by a great power, under special conditions, and at the instance of a powerful corporation, to challenge the freedom of the open sea." Cobbett, *Cases and Opinions*, I, 134. The contention of the United States was not sustained by the arbitrators. See Moore, *Int. Arb.* I, 755.

In the North Atlantic Coast Fisheries Arbitration in 1910, one of the points at issue between Great Britain and the United States was the interpretation of a clause of the treaty of 1818 by which the United States gave up any former rights of its citizens to engage in the fishing industry "in or within three marine miles of any of the coast bays, creeks, or harbours of Her Britannic Majesty's dominions in North America" not included in certain limits. The United States contended that the above described line should be measured from the shore and should follow its indentations. Great Britain relied upon the headland doctrine and argued that the line should be measured from headland to headland. The Hague Tribunal, one judge dis-

souting, sustained the British contention and said:

Admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. These conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally, in proportion to the penetration inland of the bay; but as no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the three mile rule.

On this case see Robert Lansing, "The North Atlantic Coast Fisheries Arbitration," in *Am. Jour. Int. Law*, V. 1; same title by E. M. Borchard in *Col. Law Rev.*, XI, 1. The text of the award and other documents are in Wilson, *The Hague Arbitration Cases*, 134 and in Scott, *The Hague Court Reports*, 141. See also *Argument of the Honorable Elihu Root on Behalf of the United States*, with an introduction by J. B. Scott giving an excellent account of the entire controversy.

On the whole question of jurisdiction over marginal waters see Fulton, *The Sovereignty of the Sea*,—a scholarly and well-written book; Crocker, *The Extent of the Marginal Sea*; Sir John W. Salmond, "Territorial Waters," *Law Quarterly Review*, XXXIV, 235; Sir Thomas Barclay, "Territorial Waters," *International Law Association, Twenty-seventh Report*, 81; Charteris, "Recent International Disputes Regarding International Bays," *Ib.* 107, and "Territorial Jurisdiction in Wide Bays," *Ib. Twenty Third Report*, 103 (exceptionally valuable articles); Naval War College, *International Law Topics, 1913*, 11 (an admirable treatment by Prof. George G. Wilson); Cobbett, *Cases and Opinions*, I, 136; Hyde, I, 251; Bonfils (Fauchille), sec. 490; Moore, *Digest*, I, 698.

SECTION 4. JURISDICTION ON THE HIGH SEAS.

CHURCH v. HUBBART.

SUPREME COURT OF THE UNITED STATES. 1804.
2 Cranch, 187.

Error to the Circuit Court for the District of Massachusetts.

[This was an action on two policies of insurance on the cargo of the ship *Aurora* bound from New York to Portuguese ports

on the coast of Brazil. While lying four or five leagues from land off the mouth of the river Para, the ship was seized by Portuguese authorities for attempting to trade with the Portuguese colony of Brazil contrary to the law which restricted such trade to Portuguese subjects. The defendant argued that it was relieved of liability by clauses in each policy which provided that the insurers should not be liable for seizure by the Portuguese for illicit trade. The plaintiff argued that the seizure was illegal since it was made on the high seas.]

MARSHALL, CH. J. delivered the opinion of the court. . . .

In this case the unlawfulness of the voyage was perfectly understood by both parties. That the crown of Portugal excluded, with the most jealous watchfulness, the commercial intercourse of foreigners with their colonies, was, probably, a fact of as much notoriety as that foreigners had devised means to elude this watchfulness, and to carry on a gainful but very hazardous trade with those colonies. If the attempt should succeed it would be very profitable, but the risk attending it was necessarily great. It was this risk which the underwriters . . . did not mean to take upon themselves. . . . Whenever the risk commences, the exception commences also, for it is apparent that the underwriters meant to take upon themselves no portion of that hazard which was occasioned by the unlawfulness of the voyage. If it could have been presumed by the parties to this contract, that the laws of Portugal, prohibiting commercial intercourse between their colonies and foreign merchants, permitted vessels to enter their ports, or to hover off their coasts for the purposes of trade, with impunity, and only subjected them to seizure and condemnation after the very act had been committed, or if such are really their laws, then indeed the exception might reasonably be supposed to have been intended to be as limited in its construction as is contended for by the plaintiff. . . . But this presumption is too extravagant to have been made. . . . As a general principle, the nation which prohibits commercial intercourse with its colonies must be supposed to adopt measures to make that prohibition effectual. They must, therefore, be supposed to seize vessels coming into their harbors or hovering on their coasts in a condition to trade. . . .

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora*, and that

this seizure is, on that account, a mere marine trespass not within the exception, cannot be admitted. To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle the right of a belligerent to search a neutral vessel on the high seas for contraband of war is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy: so too a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas, and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus in the channel where a very great part of the commerce to and from all the north of Europe passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves, and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions. . . .

Indeed, the right given to our own revenue cutters, to visit vessels four leagues from our coast, is a declaration that in the opinion of the American government, no such principle as that contended for, has a real existence.

THE MARIANNA FLORA.

SUPREME COURT OF THE UNITED STATES. 1826.
11 Wheaton, 1.

Appeal from the Circuit Court of the United States for Massachusetts.

[In 1821 the American armed schooner Alligator, Lieutenant Stockton commanding, while on a cruise in the Atlantic against pirates and slave-traders, met the Portuguese ship Marianna Flora. When within long shot, the latter opened fire upon the Alligator, and continued firing until within musket range, when a broadside from the Alligator silenced her. Not until that time did the Marianna Flora hoist her national flag, although the Alligator had hoisted her flag immediately upon the firing of the first shot. The Portuguese master explained his conduct by saying that he thought the Alligator was a piratical cruiser. Lieutenant Stockton took possession of the vessel and sent it to Boston where it was libelled for an alleged piratical aggression attempted or committed against the Alligator. The District Court decreed restitution of the vessel and damages for detention. Pending appeal to the Circuit Court, the ship was voluntarily restored, and the decree as to damages was then reversed. From this an appeal was taken to the Supreme Court.]

MR. JUSTICE STORY delivered the opinion of the court. . . .

In the present posture of this cause, the libellants are no longer plaintiffs. The claimants interpose for damages in their turn, and have assumed the character of actors. They contend that they are entitled to damages, first, because the conduct of Lieutenant Stockton, in the approach and seizure of the Marianna Flora, was unjustifiable; and, secondly, because, at all events, the subsequent sending her in for adjudication was without any reasonable cause.

In considering these points, it is necessary to ascertain what are the rights and duties of armed, and other ships, navigating the ocean in time of peace. It is admitted, that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions. It is true, that it has been

held in the Courts of this country, that American ships, offending against our laws, and foreign ships, in like manner, offending within our jurisdiction, may, afterwards, be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages.

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but, whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, *sic utere tuo, ut non alienum laedas*.

It has been argued, that no ship has a right to approach another at sea; and that every ship has a right to draw round her a line of jurisdiction, within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach.

This doctrine appears to us novel, and is not supported by any authority. It goes to establish upon the ocean a territorial jurisdiction, like that which is claimed by all nations within cannon-shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and permanent appropriation, and has never been successfully asserted beyond it. Every vessel undoubtedly has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognized, and we see no reason for admitting its existence. Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers; and, hitherto, there has never been supposed in such conduct any breach of the customary observances, or of the strictest principles of the law of nations. In respect to ships of war sailing, as in the present case, under the authority of their government, to arrest pirates, and other public

offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters. Such a right seems indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce. On the other hand, it is clear, that no ship is, under such circumstances, bound to lie, or wait the approach of any other ship. She is at full liberty to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. She has a right to consult her own safety; but, at the same time, she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers; either as to delay, or the progress or course of her voyage; but she is not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dangers. These principles seem to us the natural result of the common duties and rights of nations navigating the ocean in time of peace. Such a state of things carries with it very different obligations and responsibilities from those which belong to public war, and is not to be confounded with it.

The first inquiry, then, is whether the conduct of Lieutenant Stockton was, under all the circumstances preceding and attending the combat, justifiable. There is no pretence to say that he committed the first aggression. That, beyond all question, was on the part of the Marianna Flora; and her firing was persisted in after the Alligator had hoisted her national flag, and, of course, held out a signal of her real pacific character. What, then, is the excuse for this hostile attack? Was it occasioned by any default or misconduct on the part of the Alligator? It is said, that the Alligator had no right to approach the Marianna Flora, and that the mere fact of approach authorized the attack. This is what the court feels itself bound to deny. Lieutenant Stockton, with a view to the objects of his cruise, had just as unquestionable a right to use the ocean, as the Portuguese ship had; and his right of approach was just as perfect as her right of flight. But, in point of fact, Lieutenant Stockton's approach was not from mere motives of public service, but was occasioned by the acts of the Marianna Flora. He was steering on a course which must, in a short time, have carried him far away from her. She lay to, and showed a signal ordi-

narly indicative of distress. It was so understood, and, from motives of humanity, the course was changed, in order to afford the necessary relief. There is not a pretence in the whole evidence, that the lying to was not voluntary, and was not an invitation of some sort. The whole reasoning on the part of the claimants is, that it was for the purpose of meeting a supposed enemy by daylight, and, in this way, to avoid the difficulties of an engagement in the night. But how was this to be known on board of the *Alligator*? How was it to be known that she was a Portuguese ship, or that she took the *Alligator* for a pirate, or that her object in laying to was a defensive operation? When the vessels were within reach of each other, the first salutation from the ship was a shot fired ahead, and, at the same time, no national flag appeared at the mast-head. The ship was armed, appeared full of men, and, from her manœuvres, almost necessarily led to the supposition, that her previous conduct was a decoy, and that she was either a piratical vessel, or, at least, in possession of pirates. Under such circumstances, with hostilities already proclaimed, Lieutenant Stockton was certainly not bound to retreat; and, upon his advance, other guns, loaded with shot, were fired, for the express purpose of destruction. It was, then, a case of open, meditated hostility, and this, too, without any national flag displayed by the Portuguese ship, which might tend to correct the error, for she never hoisted her flag until the surrender. What, then, was Lieutenant Stockton's duty? In our view it was plain; it was to oppose force to force, to attack and to subdue the vessel thus prosecuting unauthorized warfare upon his schooner and crew. In taking, therefore, the readiest means to accomplish the object, he acted, in our opinion, with entire legal propriety. He was not bound to fly, or to wait until he was crippled. His was not a case of mere remote danger, but of imminent, pressing, and present danger. He had the flag of his country to maintain, and the rights of his cruiser to vindicate. To have hesitated in what his duty to his government called for on such an occasion would have been to betray (what no honorable officer could be supposed to indulge) an indifference to its dignity and sovereignty.

But, it is argued, that Lieutenant Stockton was bound to have affirmed his national flag by an appropriate gun; that this is a customary observance at sea, and is universally understood as indispensable to prevent mistakes and misadventures; and that the omission was such a default on his part, as places him in

delicto as to all the subsequent transactions. This imputation certainly comes with no extraordinary grace from the party by whom it is now asserted. If such an observance be usual and necessary, why was it not complied with on the part of the Marianna Flora? Her commander asserts, that by the laws of his own country, as well as those of France and Spain, this is a known and positive obligation on all armed vessels, which they are not at liberty to disregard. Upon what ground, then, can he claim an exemption from performing it? Upon what ground can he set up as a default in another, that which he has wholly omitted to do on his own part? His own duty was clear, and pointed out; and yet he makes that a matter of complaint against the other side, which was confessedly a primary default in himself. He not only did not hoist or affirm his flag in the first instance, but repeatedly fired at his adversary with hostile intentions, without exhibiting his own national character at all. He left, therefore, according to his own view of the law, his own duty unperformed, and fortified, as against himself the very inference, that his ship might properly be deemed under such circumstances, a piratical cruiser.

But, we are not disposed to admit, that there exists any such universal rule or obligation of an affirming gun, as has been suggested at the bar. It may be the law of the maritime states of the European continent already alluded to, founded in their own usages or positive regulations. But, it does not hence follow, that it is binding upon all other nations. It was admitted, at the argument, that the English practice is otherwise; and, surely, as a maritime power, England deserves to be listened to with as much respect, on such a point, as any other nation. It was justly inferred, that the practice of America is conformable to that of England; and the absence of any counterproof on the record, is almost of itself decisive. Such, however, as the practice is, even among the continental nations of Europe, it is a practice adopted with reference to a state of war, rather than peace. It may be a useful precaution to prevent conflicts between neutrals, and allies, and belligerents, and even between armed ships of the same nation. But the very necessity of the precaution in time of war arises from circumstances, which do not ordinarily occur in time of general peace. Assuming, therefore, that the ceremony might be salutary and proper in periods of war, and suitable to its exigencies, it by no means follows that it is justly to be insisted on at the peril of costs and dam-

ages in peace. In any view, therefore, we do not think this omission can avail the claimants.

Again; it is argued, that there is a general obligation upon armed ships, in exercising the right of visitation and search, to keep at a distance, out of cannon shot, and to demean themselves in such a manner as not to endanger neutrals. And this objection, it is added, has been specially provided for, and enforced by the stipulations of many of our own treaties with foreign powers. It might be a decisive answer to this argument, that, here, no right of visitation and search was attempted to be exercised. Lieutenant Stockton did not claim to be a belligerent, entitled to search neutrals on the ocean. His commission was for other objects. He did not approach or subdue the Marianna Flora, in order to compel her to submit to his search, but with other motives. He took possession of her, not because she resisted the right of search, but because she attacked him in a hostile manner, without any reasonable cause or provocation.

Doubtless the obligation of treaties is to be observed with entire good faith, and scrupulous care. But stipulations in treaties having sole reference to the exercise of the rights of belligerents in time of war, cannot, upon any reasonable principles of construction, be applied to govern cases exclusively of another nature, and belonging to a state of peace. Another consideration, quite-sufficient to establish that such stipulations cannot be applied in aid of the present case, is, that whatever may be our duties to other nations, we have no such treaty subsisting with Portugal. It will scarcely be pretended, that we are bound to Portugal by stipulations to which she is no party, and by which she incurs no correspondent obligation.

Upon the whole, we are of opinion, that the conduct of Lieutenant Stockton, in approaching, and ultimately, in subduing the Marianna Flora, was entirely justifiable. . . . The decree of the Circuit Court ought to be affirmed. . . .

THE BELGENLAND.

SUPREME COURT OF THE UNITED STATES. 1885.
114 U. S. 355.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This case grew out of a collision which took place on the high seas between the Norwegian barque *Luna* and the Belgian steamship *Belgenland* by which the former was run down and sunk. Part of the crew of the *Luna*, including the master, were rescued by the *Belgenland* and brought to Philadelphia. The master immediately libelled the steamship on behalf of the owners of the *Luna* and her cargo, and her surviving crew, in a cause civil and maritime. . . . The District Court decided in favor of the libellant. . . . An appeal was taken to the Circuit Court. . . . A decree was thereupon entered, affirming the decree of the District Court. . . . A reargument was then had on the question of jurisdiction, and the court held and decided that the Admiralty Courts of the United States have jurisdiction of collisions occurring on the high seas between vessels owned by foreigners of different nationalities; and overruled the plea to the jurisdiction.

MR. JUSTICE BRADLEY delivered the opinion of the court. . . .

The first question to be considered is that of the jurisdiction of the District Court to hear and determine the cause.

It is unnecessary here, and would be out of place, to examine the question which has so often engaged the attention of the common law courts, whether, and in what cases, the courts of one country should take cognizance of controversies arising in a foreign country, or in places outside of the jurisdiction of any country. . . . We shall content ourselves with inquiring what rule is followed by Courts of Admiralty in dealing with maritime causes arising between foreigners and others on the high seas.

This question is not a new one in these courts. Sir William Scott had occasion to pass upon it in 1799. An American ship was taken by the French on a voyage from Philadelphia to London, and afterwards rescued by her crew, carried to England, and libelled for salvage; and the court entertained jurisdiction. The crew, however, though engaged in the American

ship, were British born subjects, and weight was given to this circumstance in the disposition of the case. The judge, however, made the following remarks: "But it is asked, if they were American seamen, would this court hold plea of their demands? It may be time enough to answer this question whenever the fact occurs. In the meantime, I will say without scruple that I can see no inconvenience that would arise if a British court of justice was to hold plea in such a case; or conversely, if American courts were to hold pleas of this nature respecting the merits of British seamen on such occasions. For salvage is a question of *jus gentium*, and materially different from the question of a mariner's contract, which is a creature of the particular institutions of the country, to be applied and construed and explained by its own particular rules. There might be good reason, therefore, for this court to decline to interfere in such cases and to remit them to their own domestic forum; but this is a general claim, upon the general ground of *quantum meruit*, to be governed by a sound discretion, acting on general principles; and I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question, of such a nature, so to be determined." *The Two Friends*, 1 Ch. Rob., 271, 278.

The law has become settled very much in accord with these views. That was a case of salvage; but the same principles would seem to apply to the case of destroying or injuring a ship, as to that of saving it. Both, when acted on the high seas, between persons of different nationalities, come within the domain of the general law of nations, or *communis juris*, and are *prima facie* proper subjects of inquiry in any Court of Admiralty which first obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious, or injured, parties.

The same question of jurisdiction arose in another salvage case which came before this court in 1804, *Mason v. The Blaireau*, 2 Cranch, 240. There a French ship was saved by a British ship, and brought into a port of the United States; and the question of jurisdiction was raised by Mr. Martin, of Maryland, who, however, did not press the point, and referred to the observations of Sir William Scott in *The Two Friends*. Chief Justice Marshall, speaking for the court, disposed of the question as follows:—"A doubt has been suggested," said he, "respecting the jurisdiction of the court, and upon reference to the author-

ities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea that upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court, that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it." . . .

But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it. See 2 Parsons Ship. and Adm., 226, and cases cited in the notes. In the case of *The Jerusalem*, 2 Gall. 191, . . . Justice Story examined the subject very fully, and came to the conclusion that, wherever there is a maritime lien on the ship, an Admiralty Court can take jurisdiction on the principle of the civil law, that in proceedings *in rem* the proper forum is the *locus rei sitæ*. He added: "With reference, therefore, to what may be deemed the public law of Europe, a proceeding *in rem* may well be maintained in our courts where the property of a foreigner is within our jurisdiction. Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy." . . .

Justice Story's decision in this case was referred to by Dr. Lushington with strong approbation in the case of *The Golubchick*, 1 W. Rob., 143, decided in 1840, and was adopted as authority for his taking jurisdiction in that case.

In 1839, a case of collision on the high seas between two foreign ships of different countries (the very case now under consideration) came before the English Admiralty. The *Johann Friederich*, 1 W. Rob. 35. A Danish ship was sunk by a Bremen ship, and on the latter being libelled, the respondents entered a protest against the jurisdiction of the court. But jurisdiction was retained by Dr. Lushington who, amongst other things, re-

marked: "An alien friend is entitled to sue [in our courts] on the same footing as a British-born subject, and if the foreigner in this case had been resident here, and the cause of action had originated *infra corpus comitatus*, no objection could have been taken." Reference being made to the observations of Lord Stowell in cases of seamen's wages, the judge said: "All questions of collision are questions *communis juris*; but in case of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners is, whether the case be *communis juris* or not. . . . If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return, and, if she did, there is no part of the world to which they might not be sent for their redress."

In the subsequent case of *The Griefswald*, 1 Swabey, 430, decided by the same judge in 1859, which arose out of a collision between a British barque and a Persian ship in the Dardanelles, Dr. Lushington said: "In cases of collision, it has been the practice of this country, and, so far as I know, of the European States and of the United States of America, to allow a party alleging grievance by a collision to proceed *in rem* against the ship wherever found, and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable."

The subject has frequently been before our own Admiralty Courts of original jurisdiction, and there has been but one opinion expressed, namely, that they have jurisdiction in such cases, and that they will exercise it unless special circumstances exist to show that justice would be better subserved by declining it. . . . Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured, or doing the service, should ever be denied justice in our courts. Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is pre-eminently one *communis juris*, and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the *res* or parties, than it

could be by the courts of either of the nations to which the litigants belong. As Judge Deady very justly said, in a case before him in the district of Oregon: "The parties cannot be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is any court of admiralty within the reach of whose process they may both be found." *Bernhard v. Creene*, 3 Sawyer, 230, 235.

As to the law which should be applied in cases between parties, or ships, of different nationalities, arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted. . . .

The decree of the Circuit Court is affirmed. . . .

NORM.—It was a principle of the Roman law that the seas are free and incapable of appropriation. The Mediterranean, however—the only sea which was of much importance to the Romans—came ultimately to be surrounded by Roman territory and was dominated by Roman fleets. Until comparatively recent times, pirates were a serious danger to maritime commerce, and for their suppression, as well as for other reasons, the states which succeeded the Roman empire asserted jurisdiction not only over their marginal waters but over vast areas of the high seas. Venice claimed jurisdiction over the whole of the upper Adriatic and her claim to exact toll from vessels navigating therein was defended by the famous Paul Sarpi. The King of Denmark and Norway claimed the Sound and all the waters lying between Denmark and Iceland. The pretensions of both Venice and Denmark were based on the fact that they controlled the opposite shores and hence should control the intervening waters. More extravagant than any of these claims were those put forward by Spain and Portugal who in the sixteenth century divided the great oceans between them,—Spain taking under her exclusive jurisdiction the western portion of the Atlantic, the Gulf of Mexico, and the Pacific, while Portugal asserted similar authority in the eastern portion of the Atlantic south of Morocco and in the Indian Ocean. Such absurd claims inevitably provoked protest, and England was in a favorable position to oppose them, for, prior to the accession of James I in 1603, she had never asserted for herself any exclusive rights over any but adjacent waters. Even when Henry V, after the conquest of France and the recognition of himself as the heir to the French Crown, was urged by Parliament to levy tribute on all foreign ships in the English Channel, he refused. Hence when the Spanish Ambassador came to protest against Sir Francis Drake's plundering of Spanish merchantmen on the coast of South America, the reply of Queen Elizabeth was a statement both of the practice of her prede-

cessors as well as of the doctrine which now prevails. She said:

All are at liberty to navigate that vast ocean, since the use of the sea and the air is common to all. No nation or private person can have any title to the ocean, for neither the course of nature nor public usage permits any occupation of it.

Camden, *Annales Rerum Anglicarum*, 309.

The doctrine here stated was the basis of Grotius' well-known essay *Mare Liberum*, which was published in 1609. This in turn provoked John Selden to write *Mare Clausum*, not published, however, until 1635, which is the classic exposition of the doctrine that the high seas can be appropriated.

May a state protect itself by taking defensive measures on the high seas? In *Church v. Hubbard* (1804), 2 Cranch, 187, a claim to such a right was sustained, but the doctrine of that case has been subjected to severe criticism. See especially Wheaton (Dana), note 108. But the decision has the weighty support of Lord Stowell in *Le Louis* (1817), 2 Dodson, 210, and of Chief Justice Cockburn in *The Queen v. Keyn* (1876), L. R. 2 Ex. Div 63, 214. "Higher judicial authority to support a principle of international law could not be found," Piggott, *Nationality*, II, 49. The action of Spain in 1873 in seizing the *Virginus* on the high seas while it was employed in aid of an insurrection in Cuba against Spanish authority was an act of self-defense which was justified by facts ascertained after the capture of the vessel, and which was no less an act of self-defense because committed on the high seas. The *Virginus* was carrying an American register fraudulently obtained, but even if the register had been valid the employment of the vessel on an errand hostile to Spain justified the Spanish authorities in seizing it. The brutal slaughter of the persons found on board presents considerations of another character. See Cobbett, *Cases and Opinions*, I, 171; Hyde, I, 114; Moore, *Digest*, II, 895. See also *Rose v. Himely* (1808), 4 Cranch, 241; *Hudson v. Guestier* (1810), 6 Ib. 281; *The Apollon* (1824), 9 Wheaton, 362; *In re Cooper* (1892), 143 U. S. 472; *Cucullu v. Louisiana Insurance Co.* (1827), 5 Martin, N. S. (La.) 464; *United States v. Swan* (1892), 50 Fed. 108; *United States v. The Kodlak* (1892), 53 Fed. 126; *The Alexander* (1894), 60 Fed. 914. Sir Travers Twiss, in *The Law of Nations Considered as Independent Political Communities*, sec. 190, Sir Robert Phillimore in *Commentaries*, I, 276, Westlake, I, 175, and Pitt Cobbett, *Cases and Opinions*, I, 144, deny that any right to take defensive measures on the high seas is admitted in international law, although they concede that nations may through comity acquiesce in its exercise. But Oppenheim, I, 261, holds that long continued practice unopposed by the nations concerned has resulted in the incorporation of the principle in the body of international law. This seems a sound view. If the right to adopt defensive measures beyond a country's own jurisdiction be admitted at all, and the discussion provoked by such cases as the destruction of the *Caroline* in American waters by British forces in 1837 and the seizure of the *Virginus* on the high seas by Spain in 1873 shows that it is admitted, the legitimacy of such mild preventive measures as that involved in *Church v. Hubbard* should not

be questioned. For an extended discussion of the British Hovering Acts, see Piggott, *Nationality*, II, 40-60. For the French practice, see Mérignhac, *Traité de Droit International*, II, 387. For the American practice see Moore, *Digest*, I, 725.

A situation which well exemplified the principles laid down in *Church v. Hubbard* arose in 1864 when the *Kearsarge* appeared off Cherbourg, France, in pursuit of the *Alabama*, then lying in that harbor. When a battle was seen to be impending which might take place just beyond the three-mile limit, the French Minister of Foreign Affairs protested to the American Minister in this statement:

That a sea fight would thus be got up in the face of France, and at a distance from their coast within reach of the guns used on shipboard in these days. That the distance to which the neutral right of an adjoining government extended itself from the coast was unsettled, and that the reason of the old rules, which assumed that three miles was the outermost limit of a cannon shot, no longer existed, and that, in a word, a fight on or about such a distance would be offensive to the dignity of France and they would not permit it.

The American Minister replied that the three-mile rule was the only recognized rule, and in this stand he was supported by Secretary Seward. The protest of the French Government seems, however, to have been entirely reasonable, and had any shots from the *Kearsarge* caused damage on the adjacent coast the United States would have been responsible. In fact, the fighting began when the two vessels were about seven miles out, and the *Alabama* sank when about five miles from land. See Moore, *Digest*, I, 723.

It is admitted that an offending vessel may be pursued beyond a state's territorial limits and taken upon the high seas, provided the pursuit be instant and continuous, *The King v. The Ship North* (1905), 11 Exchequer Court of Canada, 141. See also *Annuaire de l'Institut de Droit International* (1894-95), XIII, 329. Such pursuit, however, may not be prosecuted into the territorial waters of another state, *The Itata* (1892), Moore, *Int. Arb.* III, 3067, 3070.

SECTION 5. JURISDICTION OVER MERCHANT SHIPS IN TERRITORIAL WATERS.

REGINA v. ANDERSON.

COURT OF CRIMINAL APPEAL OF ENGLAND. 1868.
11 Cox, Criminal Cases, 198.

Case reserved by Byles, J., at the October Sessions of the Central Criminal Court, 1868, for the opinion of this court.

James Anderson, an American citizen, was indicted for murder on board a vessel, belonging to the port of Yarmouth in Nova Scotia. She was registered in London, and was sailing under the British flag.

At the time of the offence committed the vessel was in the river Garonne, within the boundaries of the French empire, on her way up to Bordeaux, which city is by the course of the river about ninety miles from the open sea. The vessel had proceeded about half-way up the river, and was at the time of the offence about three hundred yards from the nearest shore, the river at that place being about half a mile wide.

The tide flows up to the place and beyond it.

No evidence was given whether the place was or was not within the limits of the port of Bordeaux.

It was objected for the prisoner that the offence having been committed within the empire of France, the vessel being a colonial vessel, and the prisoner an American citizen, the Court had no jurisdiction to try him.

I expressed an opinion unfavorable to the objection, but agreed to grant a case for the opinion of this Court.

The prisoner was convicted of manslaughter.

J. BARNARD BYLES.

BOVILL, C. J. There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was therefore subject to the laws of France, which the local authorities of that realm might have enforced if so minded; but at the same time, in point of law, the offence was also committed within British territory, for the prisoner was a seaman on board a merchant vessel, which, as to her crew and master, must be taken to have been at the time under the protection of the British flag, and, therefore, also amenable to the provisions of the British law. It is true that the prisoner was an American citizen, but he had with his own consent embarked on board a British vessel as one of the crew. Although the prisoner was subject to the American jurisprudence as an American citizen, and to the law of France as having committed an offence within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country. From the passage in the treatise of Ortolan, already quoted, it appears that, with regard to offences committed on board of foreign vessels within the French

territory, the French nation will not assert their police law unless invoked by the master of the vessel, or unless the offence leads to a disturbance of the peace of the port; and several instances where that course was adopted are mentioned. Among these are two cases where offences were committed on board American vessels—one at the port of Antwerp, and the other at Marseilles—and where, on the local authorities interfering, the American Court claimed exclusive jurisdiction. As far as America herself is concerned, it is clear that she, by the statutes of the 23d of March, 1825, has made regulations for persons on board her vessels in foreign parts, and we have adopted the same course of legislation. Our vessels must be subject to the laws of the nation at any of whose ports they may be, and also to the laws of our country, to which they belong. As to our vessels when going to foreign parts we have the right, if we are not bound, to make regulations. America has set us a strong example that we have the right to do so. In the present case, if it were necessary to decide the question on the 17 & 18 Vict. c. 104, I should have no hesitation in saying that we now not only legislate for British subjects on board of British vessels, but also for all those who form the crews thereof, and that there is no difficulty in so construing the statute; but it is not necessary to decide that point now. Independently of that statute, the general law is sufficient to determine this case. Here the offence was committed on board a British vessel by one of the crew, and it makes no difference whether the vessel was within a foreign port or not. If the offence had been committed on the high seas it is clear that it would have been within the jurisdiction of the Admiralty, and the Central Criminal Court has now the same extent of jurisdiction. Does it make any difference because the vessel was in the river Garonne half-way between the sea and the head of the river? The place where the offence was committed was in a navigable part of the river below bridge, and where the tide ebbs and flows, and great ships do lie and hover. An offence committed at such a place, according to the authorities, is within the Admiralty jurisdiction, and it is the same as if the offence had been committed on the high seas. On the whole I come to the conclusion that the prisoner was amenable to the British law, and that the conviction was right.

BYLES, J. I am of the same opinion. I adhere to the opinion that I expressed at the trial. A British ship is, for the purposes

of this question, like a floating island; and, when a crime is committed on board a British ship, it is within the jurisdiction of the Admiralty Court, and therefore of the Central Criminal Court, and the offender is as amenable to British law as if he had stood on the Isle of Wight and committed the crime. Two English and two American cases decide that a crime committed on board a British vessel in a river like the one in question, where there is the flux and reflux of the tide, and wherein great ships do hover, is within the jurisdiction of the Admiralty Court; and that is also the opinion expressed in Kent's Commentaries. The only effect of the ship being within the ambit of French territory is that there might have been concurrent jurisdiction had the French claimed it. I give no opinion on the question whether the case comes within the enactment of the Merchant Shipping Act.

BLACKBURN, J. I am of the same opinion. It is not necessary to decide whether the case comes within the Merchant Shipping Act. If the offence could have been properly tried in any English court, then the Central Criminal Court had jurisdiction to try it. It has been decided by a number of cases that a ship on the high seas, carrying a national flag, is part of the territory of that nation whose flag she carries; and all persons on board her are to be considered as subject to the jurisdiction of the laws of that nation, as much so as if they had been on land within that territory. From the earliest times it has been held that the maritime courts have jurisdiction over offences committed on the high seas where great ships go, which are, as it were, common ground to all nations, and that the jurisdiction extends over ships in rivers or places where great ships go as far as the tide extends. In this case the vessel was within French territory, and subject to the local jurisdiction, if the French authorities had chosen to exercise it. Our decisions establish that the Admiralty jurisdiction extends at common law over British ships on the high seas, or in waters where great ships go as far as the tide ebbs and flows. The cases *Rex v. Allen*, [1 Moo. C. C. 494] and *Rex v. Jemot* [Old Baily, 1812, MS.] are most closely in point and establish that offences committed on board British ships in places where great ships go are within the jurisdiction of the Court of Admiralty, and consequently of the Central Criminal Court. In America it appears, from the case of *The United States v. Wiltberger*, [5 Wheaton, 76] that it was held that the United States had no ju-

risdiction in the case of the crime of manslaughter committed on board a United States vessel in the river Tigris in China; but, as I understand the American cases of *Thomas v. Lane* [2 Sumner, 1] and *The United States v. Coombes* [12 Peters, 71], a rule more in conformity with the English decisions was laid down; and upon those authorities I take it that the American courts would agree with us. It is clear, therefore, that a person on board a British ship is amenable to the British law just as much as a British person on board an American ship is subject to the American law. My view is, that when a person is on board a vessel sailing under the British flag, and commits a crime, that nation has a right to punish him for the crime committed by him; and clearly the same doctrine extends to those who are members of the crew of the vessel.

Conviction affirmed.

[BARON CHANNEL and JUSTICE LUSH delivered concurring opinions.]

WILDENHUS' CASE.

SUPREME COURT OF THE UNITED STATES. 1887.
120 U. S. 1.

Appeal from the Circuit Court of the United States for the District of New Jersey.

[On board the Belgian steamship *Noordland*, while lying at its dock in Jersey City, New Jersey, Wildenhus, a Belgian subject and a member of the crew, murdered another Belgian subject, who was also a member of the crew. Thereupon he was arrested by the New Jersey authorities, and the Belgian consul then applied for his release on a writ of *habeas corpus* and surrender to the consul "to be dealt with according to the law of Belgium." The Circuit Court denied the writ.]

MR. CHIEF JUSTICE WAITE . . . delivered the opinion of the court. . . .

The question we have to consider is, whether these prisoners are held in violation of the provisions of the existing treaty between the United States and Belgium.

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange*, 7 Cranch, 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." *United States v. Diekelman*, 92 U. S. 520; 1 Phillimore's *Int. Law*, 3d ed. 483, § 351; Twiss' *Law of Nations in Time of Peace*, 229, § 159; Creasy's *Int. Law*, 167, § 176; Halleck's *Int. Law*, 1st ed. 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. *Regina v. Cunningham*, Bell. C. C. 72; S. C. 8 Cox C. C. 104; *Regina v. Anderson*, 11 Cox C. C. 198, 204; S. C. L. R. 1 C. C. 161, 165; *Regina v. Keyn*, 13 Cox C. C. 403, 486, 525; S. C. 2 Ex. Div. 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from

the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions. . . .

[The learned judge then considers the several types of treaty entered into by the United States for the purpose of regulating the jurisdiction of consuls within its borders.]

It thus appears that at first provision was made only for giving consuls police authority over the interior of the ship and jurisdiction in civil matters arising out of disputes or differences on board, that is to say, between those belonging to the vessel. Under this police authority the duties of the consuls were evidently confined to the maintenance of order and discipline on board. This gave them no power to punish for crimes against the peace of the country. In fact they were expressly prohibited from interfering with the local police in matters of that kind. . . .

In the next conventions consuls were simply made judges and arbitrators to settle and adjust differences between those on board. This clearly related to such differences between those belonging to the vessel as are capable of adjustment and settlement by judicial decision or by arbitration, for it simply made the consuls judges or arbitrators in such matters. That would of itself exclude all idea of punishment for crimes against the state which affected the peace and tranquillity of the port; but, to prevent all doubt on this subject, it was expressly provided that it should not apply to differences of that character.

Next came a form of convention which in terms gave the consul authority to cause proper order to be maintained on board and to decide disputes between the officers and crew, but allowed the local authorities to interfere if the disorders taking place on board were of such a nature as to disturb the public tranquillity, and that is substantially all there is in the convention with Belgium which we have now to consider. . . . Each nation has granted to the other such local jurisdiction within its own dominion as may be necessary to obtain order on board a merchant vessel, but has reserved to itself the right

to interfere if the disorder on board is of a nature to disturb the public tranquillity.

The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offence which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States. This being the case, the only important question left for our determination is whether the thing which has been done—the disorder that has arisen—on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the “public repose” of the people who look to the State of New Jersey for their protection. If the thing done—“the disorder,” as it is called in the treaty—is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they as a rule care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction. In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a “disorder” the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a “disorder” which will “disturb tranquillity and public order on shore or in the port.” The principle which governs the whole matter is this: Disorders which disturb only the

peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it. That, according to the petition for the *habeas corpus*, is this case.

This is fully in accord with the practice in France, where the government has been quite as liberal towards foreign nations in this particular as any other, and where, as we have seen in the cases of *The Sally* and *The Newton*, by a decree of the Council of State, representing the political department of the government, the French courts were prevented from exercising jurisdiction. But afterwards, in 1859, in the case of *Jally*, the mate of an American merchantman who had killed one of the crew and severely wounded another on board the ship in the port of Havre, the Court of Cassation, the highest judicial tribunal of France, upon full consideration held, while the Convention of 1853 was in force, that the French courts had rightful jurisdiction, for reasons which sufficiently appear in the following extract from its judgment:

“Considering that it is a principle of the law of nations that every state has sovereign jurisdiction throughout its territory;

“Considering that by the terms of Article 3 of the Code Napoleon the laws of police and safety bind all those who inhabit French territory, and that consequently foreigners, even *transeuntes*, find themselves subject to those laws;

“Considering that merchant vessels entering the port of a nation other than that to which they belong cannot be withdrawn from the territorial jurisdiction, in any case in which the interest of the state of which that port forms part finds itself concerned, without danger to good order and to the dignity of the government;

“Considering that every state is interested in the repression of crimes and offences that may be committed in the ports of its territory, not only by the men of the ship’s company of a

foreign merchant vessel towards men not forming part of that company, but even by men of the ship's company among themselves, whenever the act is of a nature to compromise the tranquillity of the port, or the intervention of the local authority is invoked, or the act constitutes a crime of common law," (*droit commun*, the law common to all civilized nations), "the gravity of which does not permit any nation to leave it unpunished, without impugning its rights of jurisdictional and territorial sovereignty, because that crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory." 1 Ortolan, *Diplomatie de la Mer* (4th ed.), pp. 455, 456; Sirey (N. S.), 1859, p. 189.

The judgment of the Circuit Court is affirmed.

NOTE.—Much confusion of thought as to the status of a merchant ship in the territorial waters of a foreign state has been caused by describing a merchant vessel as a part of the territory of the state to which it belongs. At best this language is only figurative, and when it is applied literally, it leads to absurd results. In *Scharrenberg v. Dollar Steamship Co. et al.* (1917), 245 U. S. 122, an attempt was made to show that a Chinese seaman shipped upon an American vessel at Shanghai thereby entered American territory and hence violated the Chinese exclusion laws. In overruling this contention the Supreme Court characterized it as "fanciful and unsound" and said:

For the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative, and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible.

A foreign merchant ship in a foreign port submits itself to the local jurisdiction in the same way that a foreign individual becomes subject to the local law and under obligation to obey it, *United States v. Diekelman* (1876), 92 U. S. 520; *United States v. Bull* (1910), 15 Philippines, 7. The view adopted by Chief Justice Waite in *Wildenhuis' Case* (1887), 120 U. S. 1, had been previously set forth by Sir Robert Phillimore in *Regina v. Keyn* (1876), 2 Ex. Div. 63, 82:

A foreign merchant vessel going into a port of a foreign country subjects herself to the ordinary law of the place during her commorancy there; she is as much a *subditus temporarius* as the individual who visits in the interior of the country for the purpose of business or pleasure.

While all countries adhere to the fundamental principle of the subjection of foreign merchant vessels to the local jurisdiction, they

differ as to the extent to which public policy and international comity require them to refrain from exercising their jurisdiction. The practices of Great Britain and the United States are substantially identical. In the case of civil controversies or minor misdemeanors arising on foreign merchant vessels, the dignity and tranquillity of the port are touched so indirectly, if touched at all, that the local tribunals will generally decline to exercise jurisdiction unless it can be shown that their refusal will result in a failure of justice, *The Bee* (1836), Federal Cases, no. 1219; *Gonzales v. Minor* (1852), *Ib.* no. 5330. In *The Topsy* (1890), 44 Fed. 631, the court, against the written protest of the British consul, took jurisdiction of a libel for wages on the ground that if the vessel should depart, the seaman, who had been discharged, would be subjected to unnecessary hardship in the enforcement of his claim. Courts are the more free to decline jurisdiction since by the comity of nations the master of a vessel is allowed in port practically the same authority over his vessel which he possesses at sea, 24 *Opinions of the Attorney General*, 531. The littoral state is the sole judge in each instance as to whether or not it will remit the complainant to the tribunals of the flag state. If it refrains from exercising its authority, it does not thereby waive it or admit any right on the part of the ship to claim immunity. In *The Nina* (1868) 17 L. T. R. 585, it was held that even an express provision in the ship's articles by which the seaman bound himself to submit to the tribunals of the flag state does not oust the local jurisdiction, and if the consul of the flag state protests, the court will exercise its discretion. In *Ex parte Newman* (1872), 14 Wallace, 152, Justice Clifford said:

Admiralty courts, it is said, will not take jurisdiction in such a case except where it is manifestly necessary to do so to prevent a failure of justice, but the better opinion is that, independent of treaty stipulation, there is no constitutional or legal impediment to the exercise of jurisdiction in such a case. Such courts may, if they see fit, take jurisdiction in such a case, but they will not do so as a general rule without the consent of the representative of the country to which the vessel belongs, where it is practicable that the representative should be consulted. His consent, however, is not a condition of jurisdiction, but it is regarded as a material fact to aid the court in determining the question of discretion, whether jurisdiction in the case ought or ought not to be exercised.

Domestic legislation however may require the courts to take jurisdiction over cases in which they would otherwise not interfere. The Seamen's Act of 1915, 38 S. 1164, prohibits the payment to any seaman of wages in advance of their being earned, and provides that such payment shall not constitute a defense to a libel or action for their recovery. In *Patterson v. Bark Eudora* (1903), 190 U. S. 169, this was held to apply to a foreign vessel shipping seamen in an American port, but in *Sandberg v. McDonald* (1918), 248 U. S.

185, it was held that wages advanced to the crew of a British vessel in Liverpool at the date of sailing could be deducted from the wages due when the vessel arrived in the United States, and likewise as to advances made to seamen shipping on an American vessel in a foreign port, although Congress undoubtedly has power to control such advances, *Neilson v. Rhine Steamship Co.* (1918), 248 U. S. 205. The Seamen's Act, sec. 4, also provides that the right which it gives to demand at certain times the payment of one-half the wages then earned "shall apply to seamen on foreign vessels while in the harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement." By virtue of this provision it was held in *Strathearn Steamship Co. Ltd. v. Dillon* (1920), 252 U. S. 348, that a British seaman who had shipped on a British vessel in Liverpool under a contract which provided that wages should be paid only at the end of the voyage could demand payment at a port in the United States of one-half of the wages then owing him. This provision reverses the rule of international comity under which the local courts have declined jurisdiction over civil controversies affecting only the ship and its crew, and affords to seamen the means of nullifying the contracts into which they entered in another jurisdiction at the beginning of the voyage.

In some cases the exercise of local jurisdiction may result in giving to the complainant a remedy which was not open to him in his own tribunals. In *The Milford* (1858), 1 Swabey, 362, a foreign master was allowed to bring an action against the ship for wages although the flag state gave him no remedy against the ship. On the other hand, if the littoral state refrains from taking jurisdiction, it may appear to disregard the rights of its own citizens.

Offenses of exceptional gravity are held to constitute such a moral disturbance of the tranquillity of the port as to require the exercise of local jurisdiction even though at the time of their commission they may not be known outside of the ship. In *Regina v. Cunningham* (1859), Bell, *Crown Cases*, 72, seamen who murdered a member of the crew of an American vessel in Bristol Channel, ten miles from the nearest land but in waters subject to British jurisdiction, were tried and convicted in a British court. As appears from *Regina v. Anderson* (1868), 11 Cox, *Criminal Cases*, 198, Great Britain also asserts jurisdiction over offences committed on British merchant ships in foreign waters. In *The Queen v. Carr* (1882), L. R. 10 Q. B. D. 76, it was held that a crime committed on a British ship in the port of Rotterdam, some eighteen miles from the open sea, was cognizable in a British court. The same rule prevails in the United States, and an offense committed on an American vessel in foreign waters is justiciable in an American court and is governed by American law, *United States v. Furlong* (1820), 5 Wheaton, 184; *Crapo v. Kelly* (1873), 16 Wallace, 610; *United States v. Rodgers* (1893), 150 U. S. 249 (applying Revised Statutes, sec. 5346); *Thompson T. & W. Association v. McGregor* (1913), 207 Fed. 209. Such jurisdiction is concurrent with that of the state where the offense took place and its exercise is dependent upon obtaining possession of the offender.

France and a considerable number of less important maritime countries qualify the British rule of the general subjection of foreign vessels to the local authorities by definitely renouncing jurisdiction over their internal discipline and order and even over the most serious crimes. This is done in the expectation that the flag state will take whatever action is necessary. As a means to that end France has entered into a large number of conventions with other states by which their consuls are vested with wide powers over vessels in French waters. Among these was the treaty of February 14, 1788 with the United States, which authorized the American consuls to exercise complete control and civil jurisdiction over American vessels in French waters, but retained under the local authorities any crime or violation of public tranquillity. It was while this convention was in force that the well known cases of *The Sally* and *The Newton* arose. Both were American vessels in French ports. The mate of *The Sally*, in what purported to be an attempt to administer discipline, wounded one of the crew. A seaman belonging to the *Newton* assaulted another member of the crew in one of the ship's boats. Both the local authorities and the American consul claimed jurisdiction. The Conseil d'État upheld the consul on the ground that the local authorities ought not to interfere unless "the peace and tranquillity of the port" had been disturbed. This controversy gave rise to the famous *Avís du Conseil d'État* of November 6, 1806, which was founded upon two principles: (1) The local authorities should not concern themselves with the internal discipline of foreign merchant ships. (2) The local authorities should not concern themselves with serious offenses or crimes committed on a foreign merchant ship unless their assistance has been invoked or unless there has been an actual disturbance of the tranquillity of the port. Pursuant to these principles, in the *Forsætning* (1837), Phillimore, I. 485, the French Government ordered a member of the crew of a Swedish vessel who was charged with murder to be surrendered to the master of the vessel. In 1859, however, the Cour de Cassation, in the case of *Jally*, mate of the American ship *Tempest*, held that the local authorities could take jurisdiction over a murder committed on an American vessel in French waters. The gravity of the crime rather than its local effect was the basis of the decision. This was an important qualification of the *Avís* of 1806, but it did not bring the French view into complete harmony with that of Great Britain and America, for the offender had been voluntarily surrendered and the American consul had waived his rights under the treaty of 1853. In the case of French vessels in foreign waters, France asserts exclusive jurisdiction of all offenses committed upon them and does not recognize the concurrent authority of the littoral state. It is the French view that the flag state shall be primarily responsible for the good order of its vessels and their companies.

Germany adheres to the *Avís* of 1806, and when an attempt was made by British officers in 1909 to arrest a fugitive offender on a German vessel which called at a British port, the refusal of the captain to permit the removal of the offender was sustained by the

German Government on the ground that the territorial authorities had no right to take coercive measures on a foreign merchant ship without the consent of the flag state.

May a foreign vessel bring from abroad and use in territorial waters articles which are protected by a patent in the littoral state? When a Dutch vessel equipped with a propeller covered by an English patent entered an English harbor, the patentee obtained an injunction against its use, *Caldwell v. Van Vlissingen* (1851), 9 Hare, 415, but an act of Parliament, 15 & 16 Vic. ch. 83, sec. 26, soon after exempted foreign vessels from the operation of British patent laws. In a similar case, *Brown v. Duchesne* (1857), 18 Howard, 183, the United States Supreme Court held that Congress did not intend its patent laws to apply to foreign vessels.

When slavery existed, the entry of a vessel carrying slaves into a country where slavery was forbidden was the source of many controversies. The littoral state was inclined to take the view that it could not be expected to assist in the maintenance of an institution which its laws did not sanction. In the notable case of the *Maria Luz*, the Emperor of Russia decided as arbitrator in 1875 that Japan was within its rights when it released Chinese coolies on a Peruvian vessel which had put in at Yokohama on its way from Macao to Peru. The Japanese authorities held that the status of the coolies was virtually a slave status, whatever might be its name, and as slavery was forbidden by the law of the Empire, the coolies were removed from the vessel and returned to China at the expense of Japan. *Annuaire de l'Institut de Droit International*, 1877, 353; Moore, *Int. Arb.*, III, 5034. For a contrary decision see Moore, *Digest*, II, 350.

Since the adoption of prohibition in the United States, the question of the jurisdiction of the littoral state over a foreign merchant vessel has gained a new importance. If a British vessel bound from Liverpool to Rio de Janeiro with a stock of liquors for the use of its passengers stops at New York, the following questions may arise while the vessel is in port: (1) May liquor be sold to visitors to the vessel? (2) May it be sold before the vessel's departure to persons who come on board at New York as passengers? (3) May it be sold to the passengers who are bound from Liverpool to Rio de Janeiro? (4) May liquor which is found upon the vessel, even though locked up and inaccessible during the vessel's stay, be seized and confiscated?

In a number of cases persons accused of political offenses have claimed a right of asylum on foreign merchant vessels. As the subjection of the vessel to the jurisdiction of the littoral state involves the right to arrest persons accused of non-political crimes so long as the orderly processes prescribed by the local law are observed, the fact that the offense charged is a political one does not alter the jurisdiction of the local authorities. This view was applied by the British Government in *Sotelo's case*, Moore, *Digest*, II, 856, and by the American Government in the cases of *Gomez* (Ib. II, 867) and *Bonilla* (Ib. II, 879). The doctrine of Secretary Blaine in the *Barlundia* case (Ib. II, 872) has found little support. See also J. B.

Moore, "Asylum in Legations and Consulates and in Vessels," *Pol. Sci. Quar.* VII, 1, 197, 397. The British consular regulations as set forth in the General Instructions for H. M. Consular Officers, 1907, express the view generally held as to the right of asylum on merchant ships. They provide:

No person seeking refuge on board such ships, with a view to evading the local laws, can be protected against the operation of those laws. The ship affords no harbour to any person whether forming part of its crew or not, liable legally to be taken into custody.

See van Praag, *Jurisdiction et Droit International Public*; Hall, *Foreign Powers and Jurisdiction of the British Crown*; Travers, *Le Droit Penal International et sa Mise en Oeuvre en Temps de Paix et en Temps de Guerre*; Charteris, "The Legal Position of Merchantmen in Foreign Ports and National Waters," *British Year Book of International Law*, 1920-21, 45; Neilsen, "The Lack of Uniformity in the Law and Practice of States with Regard to Merchant Vessels," *Am. Jour. Int. Law*, XIII, 1; "Jurisdiction over Vessels," *Harvard Law Review*, XXVII, 268; 8 *Opinions of the Attorney General* (1856), 73; Cobbett, *Cases and Opinions*, I, 289; Bonfils (Fauchille), sec. 624; Hyde, I, 393; Moore, *Digest*, II, 272, 855.

SECTION 6. JURISDICTION DERIVED FROM BELLIGERENT OCCUPATION.

THE UNITED STATES v. RICE.

SUPREME COURT OF THE UNITED STATES. 1819.
4 Wheaton, 246.

Error to the Circuit Court of Massachusetts.

MR. JUSTICE STORY delivered the opinion of the Court.

The single question arising on the pleadings in this case is, whether goods imported into Castine during its occupation by the enemy are liable to the duties imposed by the revenue laws upon goods imported into the United States. It appears, by the pleadings, that on the first day of September, 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace in February, 1815. During this period, the British government exercised all civil and military authority over the place; and established a

custom-house, and admitted goods to be imported, according to regulations prescribed by itself, and, among others, admitted the goods upon which duties are now demanded. These goods remained at Castine until after it was evacuated by the enemy; and, upon the reëstablishment of the American government, the collector of the customs, claiming a right to American duties on the goods, took the bond in question from the defendant, for the security of them.

Under these circumstances, we are all of opinion, that the claim for duties cannot be sustained. By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties, when imported, or not at all. That they were not so liable at the time of importation is clear from what has been already stated; and when, upon the return of peace, the jurisdiction of the United States was re-assumed, they were in the same predicament as they would have been if Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretence to say that American duties could be demanded; and, upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be

decisive of the question. But we think it too clear to require any aid from authority.

Judgment affirmed, with costs.

THE GERASIMO.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1857.
11 Moore, Privy Council, 88.

Appeal from the High Court of Admiralty of England.

[In the Crimean War, the *Gerasimo*, a ship under the Wallachian flag, with a cargo of corn belonging to residents of Galatz, in Moldavia, was captured by the British when coming out of the Danube, the mouth of which was then blockaded by the British fleet. When the cargo was shipped the Russians were in possession of Moldavia and Wallachia, but disclaimed any intention of altering their political status or of incorporating them in the Russian empire. The Court of Admiralty however condemned the cargo on the ground that it belonged to inhabitants of enemy territory.]

The Right Hon. T. PEMBERTON LEIGH [LORD KINGSDOWN]:

Upon the present appeal the first question is, whether the owners of the cargo, in regard to this claim, are to be considered as alien enemies; and for this purpose it will be necessary to examine carefully both the principles of law which are to govern the case, and the nature of the possession which the Russians held of Moldavia at the time of this shipment.

Upon the general principles of law applicable to this subject there can be no dispute. The national character of a trader is to be decided for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the Power under whose dominion he carries it on, and, of course, as an enemy of those with whom

that Power is at war. Nothing can be more just than this principle; but the whole foundation of it is, that the country in which the merchant trades is enemy's country.

Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile Power, so far as such Power may think fit to exercise control; or is it necessary that, either by cession or conquest, or some other means, it should, either permanently or temporarily, be incorporated with, and form part of the dominions of the invader at the time when the question of national character arises?

It appears to their Lordships that the first proposition cannot be maintained. It is impossible for any Judge, however able and learned, to have always present to his mind all the nice distinctions by which general rules are restricted; and their Lordships are inclined to think that, if the authorities which were cited and so ably commented upon at this Bar had been laid before the Judge of the Court below, he would, perhaps, have qualified in some degree the doctrine attributed to him in the judgment to which we have referred.

With respect to the meaning of the term "dominions of the enemy," and what is necessary to constitute dominion, Lord Stowell has in several cases expressed his opinion. In the case of *The Fama* (5 Rob. 115), he lays it down that in order to complete the right of property, there must be both right to the thing and possession of it; both *jus ad rem* and *jus in re*. "This," he observes, "is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly-discovered countries, when a title is meant to be established, for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, when the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such Settlements, may be informed under whose dominion and under what laws they are to live."

The importance of this doctrine will appear when the facts with respect to the occupation of the Principalities come to be examined.

That the national character of a place is not changed by the mere circumstance that it is in the possession and under the control of a hostile force, is a principle held to be of such importance that it was acted upon by the Lords of Appeal in 1808, in the St. Domingo cases of The "Dart" and "Happy Couple," when the rule operated with extreme hardship.

In the case of The "Manilla" (1 Edw. 3), Lord Stowell gives the following account of those decisions: "Several parts of it [the Island of St. Domingo] had been in the actual possession of insurgent negroes, who had detached them, as far as actual occupancy could do, from the mother country of France and its authority, and maintained, within those parts at least, an independent government of their own. And although this new power had not been directly and formally recognized by any express treaty, the British Government had shown a favourable disposition towards it on the ground of its common opposition to France, and seemed to tolerate an intercourse that carried with it a pacific and even friendly complexion. It was contended, therefore, that St. Domingo could not be considered as a colony of the enemy. The Court of Appeal, however, decided, though after long deliberation, and with much expressed reluctance, that nothing had been declared or done by the British Government that could authorize a British tribunal to consider this Island generally, or parts of it (notwithstanding a Power hostile to France had established itself within it, to that degree of force, and with that kind of allowance from some other States), as being other than still a colony, or parts of a colony of the enemy. There can be no doubt that the strict principle of that decision was correct."

On the other hand, when places in a friendly country have been seized by, and are in the possession of the enemy, the same doctrine has been held.

While Spain was in the occupation of France, and at war with Great Britain, the Spanish insurrection broke out, and the British Government issued a proclamation that all hostilities against Spain should immediately cease. Great part of Spain, however, was still occupied by French troops, and amongst others, the port of St. Andero. A ship called The "Santa Anna" was captured on a voyage, as it was alleged, to St. Andero, and Lord Stowell (1 Edw. 182) observed:—"Under these public declarations of the State, establishing this general peace and amity, I do not know that it would be in the power

of the Court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under such circumstances as would justify the confiscation of neutral property."

The same principle has been acted upon in the Courts of Common Law.

In the case of *Donaldson v. Thompson* (1 Campb. 429), the Russian troops were in possession of Corfu and the other Ionian Islands, though the form of a Republic was preserved, and it was contended that the Islands must be considered as substantially part of the territory of the Russian Empire, if the Russian power was there dominant, and the supreme authority was in the Russian Commander; or, if not, that the Republic must be considered as a co-belligerent with Russia against the Porte, since the Emperor of Russia derived the same advantages, in a military point of view, from this occupation of the Islands as if he had seized it hostilely, or the Ionian Republic had been his ally in the war he was carrying on. Both these propositions, however, were repudiated by Lord Ellenborough; and afterwards, on motion to set aside the verdict by the Court of King's Bench, Lord Ellenborough observed:—"Will any one contend that a Government which is obliged to yield in any quarter to a superior force becomes a co-belligerent with the power to which it yields? It may as well be contended that neutral and belligerent mean the same thing." The same doctrine was afterwards laid down by the Court of King's Bench, in *Hagedorn v. Bell*, (1 Mau. and Sel. 450), in the case of a trade carried on with Hamburg, which had been for several years, and at the time was in the military occupation of the French.

The distinction between hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by length of time, is recognized by Lord Stowell in the case of *The "Bolletta,"* (1 Edw. 171). A question there arose whether certain property belonging to merchants at Zante, which had been captured by a British privateer, was to be considered as French or as Russian property, that question depending upon the national character of Zante at the time of the capture. Lord Stowell observes, p. 173:—"On the part of the Crown it has been contended, that the possession taken by the French was of a forcible and temporary nature, and that such a possession

does not change the national character of the country until it is confirmed by a formal cession, or by long lapse of time. That may be true, when possession has been taken by force of arms and by violence; but this is not an occupation of that nature. France and Russia had settled their differences by the treaty of Tilsit, and the two countries being at peace with each other, it must be understood to have been a voluntary surrender of the territory on the part of Russia." On this ground he held the territory to have become French territory, remarking in a subsequent passage of his judgment that this was a cession by treaty, and not an hostile occupation by force of arms, liable to be lost again the next day.

These authorities, with the other cases cited at the Bar, seem to establish the proposition, that the mere possession of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies. . . .

Their Lordships have no hesitation in advising restitution of the cargo, with costs and damages against the captors.

DOOLEY v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1901.

182 U. S. 222.

Error to the Circuit Court of the United States for the Southern District of New York.

This was an action begun in the Circuit Court, as a Court of Claims, by the firm of Dooley, Smith & Co., engaged in trade and commerce between Porto Rico and New York, to recover back certain duties to the amount of \$5,374.68, exacted and paid under protest at the port of San Juan, Porto Rico, upon several consignments of merchandise imported into Porto Rico from New York between July 26, 1898, and May 1, 1900, viz.:

1. From July 26, 1898, until August 19, 1898, under the terms of the proclamation of General Miles, directing the exaction of the former Spanish and Porto Rican duties.

2. From August 19, 1898, until February 1, 1899, under the

customs tariff for Porto Rico, proclaimed by order of the President.

3. From February 1, 1899, to May 1, 1900, under the amended tariff customs promulgated January 20, 1899, by order of the President.

It thus appears that the duties were collected partly before and partly after the ratification of the treaty [by which Porto Rico was ceded to the United States], but in every instance prior to the taking effect of the Foraker act. The revenues thus collected were used by the military authorities for the benefit of the provisional government.

A demurrer was interposed upon the ground of the want of jurisdiction and the insufficiency of the complaint. The Circuit Court sustained the demurrer upon the second ground, and dismissed the petition. Hence this writ of error. . . .

MR. JUSTICE BROWN . . . delivered the opinion of the court. . . .

In their legal aspect, the duties exacted in this case were of three classes: (1) the duties prescribed by General Miles under order of July 26, 1898, which merely extended the existing regulations; (2) the tariffs of August 19, 1898, and February 1, 1899, prescribed by the President as Commander-in-Chief, which continued in effect until April 11, 1899, the date of the ratification of the treaty and the cession of the island to the United States; (3) from the ratification of the treaty to May 1, 1900, when the Foraker act took effect.

There can be no doubt with respect to the first two of these classes, namely, the exaction of duties under the war power, prior to the ratification of the treaty of peace. While it is true the treaty of peace was signed December 10, 1898, it did not take effect upon individual rights, until there was an exchange of ratifications. *Haver v. Yaker*, 9 Wall. 32. Upon the occupation of the country by the military forces of the United States, the authority of the Spanish Government was superseded, but the necessity for a revenue did not cease. The government must be carried on, and there was no one left to administer its functions but the military forces of the United States. Money is requisite for that purpose, and money could only be raised by order of the military commander. The most natural method was by the continuation of existing duties. In adopting this method, General Miles was fully justified by the laws of war.

The doctrine upon this subject is thus summed up by Halleck in his work on International Law, (vol. 2, page 444): "The right of one belligerent to occupy and govern the territory of the enemy while in its military possession, is one of the incidents of war, and flows directly from the right to conquer. We, therefore, do not look to the Constitution or political institutions of the conqueror, for authority to establish a government for the territory of the enemy in his possession, during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority and such rules are derived directly from the laws of war, as established by the usage of the world, and confirmed by the writings of publicists and decisions of courts—in fine, from the law of nations. . . . The municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. . . . He, nevertheless, has all the powers of a *de facto* government, and can at his pleasure either change the existing laws or make new ones."

In *New Orleans v. Steamship Co.*, 20 Wall. 387, 393, it was said, with respect to the powers of the military government over the city of New Orleans after its conquest, that it had "the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has the right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject." See also *Thirty Hogsheads of Sugar v. Boyle*, 9 Cr. 191; *Fleming v. Page*, 9 How. 603; *American Ins. Co. v. Canter*, 1 Pet. 511.

But it is useless to multiply citations upon this point, since the authority to exact similar duties was fully considered and affirmed by this court in *Cross v. Harrison*, 16 How. 164. This

case involved the validity of duties exacted by the military commander of California upon imports from foreign countries, from the date of the treaty of peace, February 3, 1848, to November 14, 1849, when the collector of customs appointed by the President entered upon the duties of his office. Prior to the treaty of peace, and from August, 1847, duties had been exacted by the military authorities, the validity of which does not seem to have been questioned. Page 189: "That war tariff, however, was abandoned as soon as the military governor had received from Washington information of the exchange and ratification of the treaty with Mexico, and duties were afterwards levied in conformity with such as Congress had imposed upon foreign merchandise imported into other ports of the United States, Upper California having been ceded by the treaty to the United States." The duties were held to have been legally exacted. Speaking of the duties exacted before the treaty of peace, Mr. Justice Wayne observed (p. 190): "No one can doubt that these orders of the President, and the action of our Army and Navy commanders in California, in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations." It was further held that the right to collect these duties continued from the date of the treaty up to the time when official notice of its ratification and exchange were received in California. Owing to the fact that no telegraphic communication existed at that time, the news of the ratification of this treaty did not reach California until August 7, 1848, during which time the war tariff was continued. The question does not arise in this case, as the ratifications of the treaty appear to have been known as soon as they were exchanged.

The court further held in *Cross v. Harrison* that the right of the military commander to exact the duties prescribed by the tariff laws of the United States continued until a collector of customs had been appointed. Said the court: "The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted by the command of the President of the United States. It was the government when the territory was conceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence, of the restora-

tion of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. . . . We think it was continued over a ceded conquest, without any violation of the Constitution or laws of the United States, and that, until Congress legislated for it, the duties upon foreign goods, imported into San Francisco, were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason."

Upon this point that case differs from the one under consideration only in the particular that the duties were levied in *Cross v. Harrison* upon goods imported from foreign countries into California, while in the present case they were imported from New York, a port of the conquering country. This, however, is quite immaterial. The United States and Porto Rico were still foreign countries with respect to each other, and the same right which authorized us to exact duties upon merchandise imported from Porto Rico to the United States authorized the military commander in Porto Rico to exact duties upon goods imported into that island from the United States. The fact that, notwithstanding the military occupation of the United States, Porto Rico remained a foreign country within the revenue laws is established by the case of *Fleming v. Page*, 9 How. 603, in which we held that the capture and occupation of a Mexican port during our war with that country did not make it a part of the United States, and that it still remained a foreign country within the meaning of the revenue laws. The right to exact duties upon goods imported into Porto Rico from New York arises from the fact that New York was still a foreign country with respect to Porto Rico, and from the correlative right to exact at New York duties upon merchandise imported from that island. . . .

Without questioning at all the original validity of the order imposing duties upon goods imported into Porto Rico from foreign countries, we think the proper construction of that order is, that it ceased to apply to goods imported from the United States from the moment the United States ceased to be a foreign country with respect to Porto Rico, and that until

Congress otherwise constitutionally directed, such merchandise was entitled to free entry.

An unlimited power on the part of the Commander-in-Chief to exact duties upon imports from the States might have placed Porto Rico in a most embarrassing situation. The ratification of the treaty and the cession of the island to us severed her connection with Spain, of which the island was no longer a colony, and with respect to which she had become a foreign country. The wall of the Spanish tariff was raised against her exports, the wall of the military tariff against her imports, from the mother country. She received no compensation from her new relations with the United States. If her exports, upon arriving there, were still subject to the same duties as merchandise arriving from other foreign countries, while her imports from the United States were subjected to duties prescribed by the Commander-in-Chief, she would be placed in a position of practical isolation, which could not fail to be disastrous to the business and finances of an island. It had no manufacturers or markets of its own, and was dependent upon the markets of other countries for the sale of her productions of coffee, sugar and tobacco. In our opinion the authority of the President as Commander-in-Chief to exact duties upon imports from the United States ceased with the ratification of the treaty of peace, and her right to the free entry of goods from the ports of the United States continued until Congress should constitutionally legislate upon the subject.

The judgment of the Circuit Court is therefore reversed. . . .

MR. JUSTICE WHITE, (with whom concurred MR. JUSTICE GRAY, MR. JUSTICE SHIRAS and MR. JUSTICE MCKENNA,) dissenting. . . .

MACLEOD v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1913.
229 U. S. 416.

Appeal from the Court of Claims.

[War having been declared between the United States and Spain on April 25, 1898, the forces of the United States on

May 1 following captured Manila Bay and harbor. On July 12, the President of the United States issued an order setting forth a "tariff of duties and taxes to be levied, and collected as a military contribution" in all ports and places in the Philippine Islands which should be occupied by the American forces. On December 25, 1898, the Spanish forces evacuated the Island of Cebu, having first appointed a provisional governor. Shortly thereafter the native inhabitants, formerly in insurrection against Spain, took possession of the island, established a republic, and administered the island until possession was surrendered to the United States on February 22, 1899, prior to which time no authorities of the United States had been in the island. While the island was under control of its native inhabitants, the appellant, charterer of the American steamship *Venus*, which arrived at Cebu, with a cargo of rice, from Saigon, China, on January 29, 1899, was required to pay duties to the native government before he was permitted to land his cargo. The steamer then proceeded to Manila, where the American authorities, acting under the President's proclamation of July 12, 1898, exacted a second payment of duties on the same cargo. The appellant paid the duties under protest and then brought suit in the Court of Claims for their recovery. That court having dismissed his petition, 45 Ct. Cl. 339, he appealed to this court.]

MR. JUSTICE DAY . . . delivered the opinion of the court.

When the Spanish fleet was destroyed at Manila, May 1, 1898, it became apparent that the Government of the United States might be required to take the necessary steps to make provision for the government and control of such part of the Philippines as might come into the military occupation of the forces of the United States. The right to thus occupy an enemy's country and temporarily provide for its government has been recognized by previous action of the executive authority and sanctioned by frequent decisions of this court. The local government being destroyed, the conqueror may set up its own temporary government, and to that end may collect taxes and duties to support the military authority and carry on operations incident to the occupation. Such was the course of the Government with respect to the territory acquired by conquest and afterwards ceded by the Mexican Government to the United States. *Cross v. Harrison*, 16 How. 164. See also in this connection

Fleming v. Page, 9 How. 603; New Orleans v. Steamship Co., 20 Wall. 387; Dooley v. United States, 182 U. S. 222; 7 Moore's International Law Digest, §§ 1143 *et seq.*, in which the history of this government's action following the Mexican War and during and after the Spanish-American War is fully set forth: and also Taylor on International Public Law, chapter ix, Military Occupation and Administration, §§ 568 *et seq.*, and 2 Oppenheim on International Law, §§ 166, *et seq.*

There has been considerable discussion in the cases and in works of authoritative writers upon the subject of what constitutes an occupation which will give the right to exercise government authority. Such occupation is not merely invasion, but is invasion plus possession of the enemy's country for the purpose of holding it temporarily at least. 2 Oppenheim, § 167. What should constitute military occupation was one of the matters before The Hague Convention in 1899 respecting laws and customs of war on land, and the following articles were adopted by the nations giving adherence to that Convention, among which is the United States (32 Stat. II, 1821):

"Article XLII. Territory is considered occupied when it is actually placed under the authority of the hostile army.

"The occupation applies only to the territory where such authority is established, and in a position to assert itself.

"Article XLIII. The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to reestablish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

A reference to the Messages and Papers of the Presidents, to which we may refer as matters of public history, shows that the President was sensible of and disposed to conform the activities of our Government to the principles of international law and practice. See 10 Messages and Papers of the Presidents, 208, executive order of the President to the Secretary of War, in which the President said (p. 210):

"While it is held to be the right of a conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expenses of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government

become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contributions to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army."

To the same effect, executive order of the President to the Secretary of the Treasury, in which the President said (p. 211):

"I have determined to order that all ports or places in the Philippines which may be in the actual possession of our land and naval forces by conquest shall be opened, while our military occupation may continue, to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the rates of duty which may be in force at the time when the goods are imported."

And the like executive order of the President to the Secretary of the Navy (p. 212).

In pursuance of this policy, the order of July 12, 1898, was framed. By its plain terms the President orders and directs the collection of tariff duties at ports in the occupation and possession of the forces of the United States. More than this would not have been consistent with the principles of international law, nor with the practice of this Government in like cases. While the subsequent order of December 21, 1898, made after the signing of the treaty of peace, is referred to in the brief of counsel for the Government, it was not alluded to in the findings of fact of the Court of Claims; but we find in that order nothing indicating a change of policy in respect to the collection of duties. While the signing of the treaty of peace between the United States and Spain on December 10, 1898, was stated, the responsible obligations imposed upon the United States by reason thereof were recited and acknowledged and the necessity of extending the government with all possible dispatch to the whole of the ceded territory was emphasized, no disposition was shown to enlarge the number of ports and places in the Philippine Islands at which duties should be collected so as to include those not occupied by the United States, and the President said (p. 220):

"All ports and places in the Philippine Islands in the actual possession of the land and naval forces of the United States will be opened to the commerce of all friendly nations. All

goods and wares not prohibited for military reasons, by due announcement of the military authority, will be admitted upon payment of such duties and other charges as shall be in force at the time of their importation."

The occupation by the United States of the city, bay and harbor of Manila pending the conclusion of a treaty which should determine the control, disposition and government of the Philippines was provided for by the protocol of August 12, 1898, and the necessity of further occupation until the exchange of ratifications by the Government of Spain and the United States, was recognized by the President in the order of December 21, 1898. We have been unable to find anything in the executive or congressional action prior to the importation of the cargo now in question having the effect to extend the executive order as to the collection of duties during the military occupation to ports and places not within the occupation and control of the United States.

The statement of the facts shows that the insurgent government was in actual possession of the custom-house at Cebu, with power to enforce the collection of duties there, as it did. Such government was of the class of *de facto* governments described in 1 Moore's International Law Digest, § 20, as follows:

"But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1) that its existence is maintained by active military power within the territories, and against the rightful authority of an established and lawful government; and (2) that while it exists it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered also, by civil authority, supported more or less directly by military force." *Thorington v. Smith*, 8 Wall. 1, 9.

The attitude of this Government toward such *de facto* governments was evidenced in the Bluefields case, a full account of which is given in 1 Moore's International Law Digest, pp. 49 *et seq.* In that case General Reyes had headed an insurrection-

ary movement at Bluefields and acquired actual control of the Mosquito Territory in Nicaragua. His control continued for a short time only, February 3 to February 25, 1899, and after the reestablishment of the Nicaraguan Government at Bluefields it demanded of American merchants the payment to it of certain amounts of duty which they had been compelled to pay to the insurgent authorities during the period of their *de facto* control. The American Government remonstrated, and the duties demanded by the Nicaraguan Government were by agreement deposited in the British consulate pending a settlement of the controversy. The Department of State of the United States, upon receiving sworn statements of the American merchants to the effect that they were not accomplices of Reyes, that the money actually exacted was the amount due on bonds which then matured for duties levied in December, 1898, payments being made to the agent of the titular government who was continued in office by General Reyes, that payment was demanded under threat of suspension of importations, and that from February 3 to February 25 General Reyes was in full control of the civil and military agencies in the district, expressed the opinion that to exact the second payment would be an act of international injustice: and the money was finally returned to the American merchants with the assent of the Government of Nicaragua.

A similar case appears in 1 Moore's International Digest, p. 49, in which our Government was requested by Great Britain to use its good offices to prevent the exaction by the Mexican Government of certain duties at Mazatlan, which had been previously paid to insurgents. The then Secretary of State, Mr. Fish, instructed our Minister to Mexico as follows:

"It is difficult to understand upon what ground of equity or public law such duties can be claimed. The obligation of obedience to a government at a particular place in a country may be regarded as suspended, at least, when its authority is usurped, and is due to the usurpers if they choose to exercise it. To require a repayment of duties in such cases is tantamount to the exaction of a penalty on the misfortune, if it may be so called, of remaining and carrying on business in a port where the authority of the government had been annulled. The pretension is analogous to that upon which vessels have been captured and condemned upon a charge of violating a blockade of a port

set on foot by a proclamation only, without force to carry it into effect."

See also Colombian Controversy, 6 Moore's International Law Digest, pp. 995 *et seq.* . . .

We do not think that it was the purpose of the executive order under which the government at Manila was instituted and maintained at the time of this importation to direct the collection of the duties at ports not in the occupation of the United States, and certainly not at one actually in the possession of a *de facto* government, as is shown in this case. . . .

We think the Court of Claims was in error in holding the duties collectible at Manila under the circumstances related. . . . Its judgment will therefore be reversed and the case remanded to the Court of Claims with instructions to enter judgment for the claimant. *Reversed.*

NOTE.—The most important discussions of the law governing military occupation are Fleming v. Page (1850), 9 Howard, 603; Cross v. Harrison (1854), 16 Ib. 164; Leitensdorfer v. Webb (1858), 20 Ib. 176; New Orleans v. Steamship Co. (1875), 20 Wallace, 387; Coleman v. Tennessee (1879), 97 U. S. 509; Ferrand, *Des Réquisitions en Matière de Droit International Public*; Pillet, *Les Lois Actuelles de la Guerre*; Oppenheim, "The Legal Relations Between an Occupying Power and the Inhabitants," *Law Quarterly Review*, XXXIII, 363; Spaight, *War Rights on Land*; Birkhimer, *Military Government and Martial Law*; Cobbett, *Cases and Opinions*, II, 108; Magoon, *Reports*, 11-36, 225-228, 261-455; Bonfils (Fauchille), sec. 1155; Hyde, II, 361, and Moore, *Digest*, I, 45, VII, 257. The methods employed by the Germans during their occupation of Belgium and Northern France are described in Garner, vol. II.

In determining upon the measures and methods of government to be adopted in the occupied territory, the occupant is limited only by the restraints of his own municipal law and by the laws and usages of war, Little v. Barreme (1804), 2 Cranch, 168; Mitchell v. Harmony (1852), 13 Howard, 115; United States v. Diekelman (1876), 92 U. S. 520; Dow v. Johnson (1880), 100 U. S. 158; Gates v. Goodloe (1880), 101 U. S. 612. He may enforce the existing local law or substitute a new system of his own making, United States v. Reiter (1865), 27 Fed. Cases, No. 16146. The system of military government does not necessarily cease with the termination of war, Cross v. Harrison (1854), 16 Howard, 164. *Contra*, Ex parte Ortiz (1900), 100 Fed. 955. Allegiance to the conqueror during a temporary military occupation merely suspends the former allegiance. It does not make the inhabitants aliens *de facto*, Shanks v. Dupont (1830), 3 Peters, 242; United States v. Huckabee (1873), 16 Wallace, 414.

The terms martial law and military law are frequently used synonymously. This is erroneous. Military law applies only to persons in the military and naval forces and applies to them in both peace and war. Martial law as an instrument of domestic government pre-

supposes a state of public danger or grave disorder necessitating the substitution of summary military methods for the more deliberate methods of the civil law. In contemplation of international law, however, martial law is that body of law which is imposed upon an occupied district by the will of the military occupant. It may be, and in great part it usually is, the law which prevailed in the district prior to its subjugation, but during the occupation it derives its authority from the will of the occupant. See *Ex parte Milligan* (1866), 4 Wallace, 2; *Marais v. Attorney General of Natal* (1902), L. R. [1902] A. C. 109; *Johnson v. Jones* (1867), 44 Ill. 142, 153; *Grove v. Mott* (1884), 46 N. J. Law, 328, 331; Sir Frederick Pollock, "What is Martial Law," *Law Quarterly Review*, XVIII, 152.

CHAPTER VI.

EXEMPTIONS FROM JURISDICTION.

SECTION 1. SOVEREIGNS.

MIGHELL v. SULTAN OF JOHORE.

COURT OF APPEAL OF ENGLAND. 1893.
Law Reports [1894] 1 Q. B. 149.

Motion to set aside an order for substituted service of a writ of summons in an action for breach of promise of marriage, and to stay all proceedings therein, on the ground that the Court had no jurisdiction over the defendant, who was described in the writ as "The Sultan of the State and Territory of Johore, otherwise known as Albert Baker." . . .

LORD ESHER, M. R. For the purposes of my judgment I must assume that the Sultan of Johore came to this country and took the name of Albert Baker, and that the plaintiff believed that his name was Albert Baker, and I will go so far as to assume for the present purpose that he deceived her by pretending to be Albert Baker, and then promised to marry her, and that he broke his promise. Whether these matters could be proved, if the case went further, is entirely another matter; but at the present stage of the case I will assume them to be true. At length, when he is sued, he alleges that he is a sovereign prince, and that no action can be maintained against him in the municipal Courts of this country for anything which he has done. . . .

The first point taken was that it was not sufficiently shewn that the defendant was an independent sovereign power. There was a letter written on behalf of the Secretary of State for the Colonies, on paper bearing the stamp of the Colonial Office, and which clearly came from the Secretary of State for the Colonies in his official character. He is in colonial matters the adviser of the Queen, and I think the letter has the same effect for the

present purposes as a communication from the Queen. It was argued that the judge ought not to have been satisfied with that letter, but to have informed himself from historical and other sources as to the status of the Sultan of Johore. It was said that Sir Robert Phillimore did so in the case of *The Charkieh*, Law Rep. 4 A. & E. 59. I know he did; but I am of opinion that he ought not to have done so; that, when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent sovereign. For this purpose all sovereigns are equal. The independent sovereign of the smallest state stands on the same footing as the monarch of the greatest.

It being established that the defendant is in that position, can he be sued in the Courts of this country? It is not contended that he could, unless by coming into this country, and living there under a false name, and—I will assume for the present purpose—by so deceiving the plaintiff, he has lost his privilege as an independent sovereign and made himself subject to the jurisdiction. In the case of *The Parlement Belge*, 5 P. D. 197, the whole subject was carefully considered. As I have pointed out, great judges in the House of Lords and the Queen's Bench had in previous cases declined to decide this point, but I think that this Court was there called upon to decide the point, and did decide it. I said, in giving the judgment of the Court in that case, after citing passages from various authorities, and a minute examination of the cases on the subject (see p. 214 of the report), "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." It appears to me that, by the authority of this Court, the rule was thus laid down absolutely and without any qualification. We had not then to deal with the question of a foreign sovereign submitting to the jurisdiction; every-

body knows and understands that a foreign sovereign may do that. But the question is, How? What is the time at which he can be said to elect whether he will submit to the jurisdiction? Obviously, as it appears to me, it is when the Court is about or is being asked to exercise jurisdiction over him, and not any previous time. Although up to that time he has perfectly concealed the fact that he is a sovereign, and has acted as a private individual, yet it is only when the time comes that the Court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction. If it is then shewn that he is an independent sovereign, and does not submit to the jurisdiction, the Court has no jurisdiction over him. It follows from this that there can be no inquiry by the Court into his conduct prior to that date. The only question is whether, when the matter comes before the Court, and it is shewn that the defendant is an independent sovereign, he then elects to submit to the jurisdiction. If he does not the Court has no jurisdiction. It appears to me that this is the result of the principles laid down in *The Parlement Belge*, 5 P. D. 197. Therefore, I think the Court has no jurisdiction to enter into any inquiry into the matters alleged by the plaintiff, the defendant being an independent sovereign, and not submitting himself to the jurisdiction. For these reasons the appeal must be dismissed.

[LOPES, L. J. and KAY, L. J. delivered concurring opinions.]

SOUTH AFRICAN REPUBLIC v. LA COMPAGNIE
FRANCO-BELGE DU CHEMIN DE FER DU NORD.

CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE OF ENGLAND. 1897.
Law Reports [1898] 1 Ch. 190.

[In 1882 the defendant corporation was formed in Belgium for the purpose of acquiring and working a railway concession in the South African Republic. A difference of opinion having arisen between the Republic and the company as to the control of certain of the company's funds on deposit in England, the South African Republic instituted an action in answer to which the defendants set up a counterclaim by which it claimed payment of £208,800 on account of alleged breaches of the terms of

the concession, and of £100,000 for libel, and asked that the Republic be enjoined from declaring the concession void. That part of the counterclaim relating to the libel was struck out by the court, whereupon the plaintiffs asked that the other portion of the counterclaim should also be struck out.]

NORTH, J. . . . They have applied now that the other portion of the counterclaim may be struck out too. They say that a foreign Government coming here to sue can be met by defence or counter-claim with respect to the matters incident to the subject-matter of the action brought by the foreign Government; but the plaintiffs deny, and the defendants allege that, by the foreign Government coming here as plaintiffs, they have submitted to the general jurisdiction of the Court, so as to be capable of being caught and sued here in respect of any matter which would be a proper subject of litigation between them if the two parties were private individuals, both resident in this country, and subject to the jurisdiction of its Courts.

Now, on that, several cases were cited as to the position of a foreign Government coming here to sue. There are only two or three that I need refer to very shortly. The first is *Duke of Brunswick v. King of Hanover*, 6 Beav. 38, where Lord Langdale says—I need only read a few lines of a very long judgment—“The cases which we have upon this point go no further than this; that where a foreign Sovereign files a bill, or prosecutes an action in this country, he may be made a defendant to a cross-bill or bill of discovery in the nature of a defence to the proceeding, which the foreign Sovereign has himself adopted. There is no case to shew that, because he may be plaintiff in the courts of this country for one matter, he may therefore be made a defendant in the courts of this country for another and quite a distinct matter; and the question to be now determined is independent of the fact stated at the bar, that the King of Hanover is or was himself plaintiff in a suit for an entirely distinct matter in this court.” It is clear that Lord Langdale considered the law settled. There may be a proceeding against a foreign government plaintiff by way of counter-proceeding, by cross-bill, or, what I take to be not the same as a cross-bill, a bill of discovery—it might be either a bill of discovery, if necessary, or a cross-bill—in the nature of a defence to the proceedings set up by the plaintiff; but not a proceeding setting up

against the Sovereign another claim in respect of another and entirely distinct matter.

Then there was a case—*Strousberg v. Republic of Costa Rica*, 29 W. R. 125,—where the Republic of Costa Rica had sued Strousberg in this country, and judgment had been recovered in that action for them. There had been a final judgment for the payment of large sums of money; there had been no cross-bill apparently, or cross-action, pending that action; but, after it was disposed of, and final judgment had been recovered, Strousberg sought to sue the Government of Costa Rica in this country for the purpose of setting up a claim to meet the claim of the Government under the judgment. That proceeding was clearly wrong. If he could have taken any step, it ought to have been to stay proceedings in the action under which the judgment had been recovered; but in the course of the judgment both the Master of the Rolls and James L. J. made certain observations, not essential for the judgment, but arising out of the matter before the Court, that are useful to be considered. Pollock B. had made an order in chambers allowing service of the writ in this new action upon the ground that it was in the nature of a cross-action. Thereupon the Government entered a conditional appearance and moved to discharge the order. The Court of Appeal decided that the order ought not to have been made, and ought to be discharged. The Master of the Rolls pointed out it was made under a misunderstanding. He said, the learned judge “was told, and he seems to have adopted the statement without sufficient knowledge of the prior proceedings, that it was in the nature of a counter-claim or cross-action, and in that case, no doubt,”—that is to say, if it was a counter-claim or cross-action—“you can make a Sovereign State a defendant, with a view of doing justice in the original action brought by the Sovereign State”—not settling every possible matter in dispute between the parties, but doing justice in the original action. Then James L. J. says: “It appears to me that it is due from one nation to another, that one Sovereign should not assume or usurp jurisdiction over another Sovereign. It is a violation of the respect due to a foreign Sovereign or State to issue the process of our Courts against such Sovereign or State. There is but one exception, if it can be called an exception, to the rule, and that is where a foreign Sovereign or State comes into the Courts of this country for the purpose of obtaining some remedy; then by way of defence to that proceeding, the

person sued here may file a cross-claim against that Sovereign or State for enabling complete justice to be done between them. The defendant in that case is, in fact, only giving to the foreign Sovereign's attorney or solicitor notice of the proceedings—for that is, in substance, what it comes to—so as to bring in whatever defence or counter-claim there might be as a set-off. We went recently very fully, in the case of *The Parlement Belge*, 5 P. D. 197, into the question of the extent to which the Courts of this country ought to go, even as to property of a foreign Sovereign found here, and I have no hesitation, having fully considered the matter, in arriving at the conclusion I have now stated." Then he said there was one other case in which a foreign Sovereign might be joined as defendant to an action, and that was where he was, or was alleged to be, one of several claimants upon a fund over which the Court had jurisdiction. I do not read the part of the judgment relating to that, because it is not material to the case here.

Now, I believe the law is still exactly as it was stated to be at the time Lord Langdale laid it down in the way in which he did. Here the defendant has brought in a counter-claim, and there seem to me to be two questions on it, first of all, whether it is a case in which, having regard to the action in which the foreign Government has submitted to the jurisdiction, this is a case in which a counter-claim such as this can properly be put in; and, secondly, if it is, whether as a matter of convenience, assuming the Court could allow it, it is more convenient that the subject-matter should be dealt with in a separate action, or in this action. . . .

[The learned judge found that the sums of money alleged in the counterclaim to be due to the defendants were not sums in respect of which the defendants had any claim upon the fund then in question. "The claim, if any, is against the Government for particular sums, which would have to be paid by the Government out of its general revenues, and for which there is no claim on the fund in question in any way." The counterclaim was therefore struck out.]

NOTE.—The privileges and immunities which attach to sovereigns and their agents when in foreign territory are universally recognized, but the most eminent authorities have differed as to their basis and their source. Lord Mansfield derived them from international law. Not having been conferred by any one state, they may not be withdrawn by any one state. A privilege or right which is derived from all

may only be cancelled by all, *Heathfield v. Chilton* (1767), 4 Burrow, 2015. Chief Justice Marshall found that such privileges and immunities are based upon a tacit or implied promise to refrain from exercising jurisdiction, and that it is with this promise in mind that sovereigns enter foreign territory or send their diplomatic representatives and public vessels thither, *The Schooner Exchange v. McFaddon* (1812), 7 Cranch, 116. If this be true, then a state is bound to observe such immunities only with reference to those persons who have already entered its jurisdiction, but it is free to give notice that for the future it will assert jurisdiction over all persons and things within its limits. Such an announcement would not contravene any promise either express or implied, and would not constitute a breach of faith. A state making such an announcement however would undoubtedly be met by the claim that the immunities of sovereigns and their agents are not subject to alteration by any one member of the family of nations, but have been established by common consent and rest upon the same basis as do all other rules of international law.

Although doubt was once expressed by Lord Thurlow, it is now well settled that the courts both of law and of equity are open to suits by foreign sovereigns, *Hullett v. King of Spain* (1828), 1 Dow. & Clark, 169; *Duke of Brunswick v. King of Hanover* (1828), 2 H. L. Cases, 1; *King of Prussia v. Kuepper* (1856), 22 Mo. 550. It was once thought that the suit of a foreign state must be brought in the name of an individual upon whom process could be served, *Colombian Government v. Rothschild* (1826), 1 Sim. 94, but it is now recognized that suit may be brought in the name of the state itself, *United States v. Prioleau* (1865), 35 L. J. Ch. (N. S.) 7; *United States v. Wagner* (1867), L. R. 2 Ch. 582; *South African Republic v. La Compagnie Franco-Belge* [1897] 2 Ch. 487. While the property of a state is generally exempt from judicial process, yet if it is in the possession of a person subject to the jurisdiction of a court of equity, the court will sometimes control its disposition, *Gladstone v. Musurus Bey* (1862), 1 H. & M. 495; *Gladstone v. The Ottoman Bank* (1863), 1 H. & M. 505. In the important case of *von Hellfeld v. Russian Government* (1910), *Am. Jour. Int. Law*, V, 490, it was held that although the Russian Government had submitted to the jurisdiction of the German court in Kiao-chau, execution on the judgment there obtained against Russia could not issue against Russian property in Berlin. While a state is exempt from suit it may waive its immunity either expressly, *Porto Rico v. Ramos* (1914), 232 U. S. 627, or by entering its appearance, *Richardson v. Fajardo Sugar Co.* (1916), 241 U. S. 44, or by intervening in a private suit to protect its own interests, *Veitia v. Fortuna Estates* (1917), 240 Fed. 256.

If a sovereign institutes an action in the courts of another country, he subjects himself to many of the rules applicable to private litigants. "He brings with him no privileges that can displace the practice as applying to other suitors," *The King of Spain v. Hullett* (1838), 1 C. & F. 333; *The Newbattle* (1885), 10 P. D. 33. He may be required to give security for costs, *Rothschild v. Queen of Portugal* (1839), 3 Y. & C. 594; *Honduras v. Soto* (1889), 112 N. Y. 310; or to

meet any defenses, set-offs or cross-bills incident to the subject-matter of the action, *The Jane Palmer* (1820), 270 Fed. 609; or to be bound by a lien on property for which it sues, *United States v. Prioleau* (1865), 35 L. J. Ch. (N. S.) 7. But a counterclaim independent of the original transaction or which could be made the basis of an affirmative judgment cannot be set up against the plaintiff, *Kingdom of Roumania v. Guaranty Trust Co.* (1918), 250 Fed. 341. In this respect a sovereign is not in the same position as a private litigant, *The French Republic v. Inland Navigation Co.* (1920), 263 Fed. 410.

For further discussion of the rights and immunities of sovereigns, see *Munden v. Duke of Brunswick* (1847), 10 Q. B. 656; Wolfman, "Sovereigns as Defendants," *Am. Jour. Int. Law*, IV, 373; Weston, "Actions against the Property of Sovereigns," *Harvard Law Review*, XXXII, 266; van Praag, *Jurisdiction et Droit International Public*, 438-453; Cobbett, *Cases and Opinions*, I, 94; Borchard, sec. 72; Bonfils (Fauchille), sec. 632; Hyde, I, 430; Moore, *Digest*, II, 558.

SECTION 2. DIPLOMATIC AGENTS.

THE MAGDALENA STEAM NAVIGATION COMPANY v. MARTIN.

COURT OF QUEEN'S BENCH OF ENGLAND. 1859.
2 ELLIS & ELLIS, 94.

LORD CAMPBELL C. J. now delivered the judgment of the Court.

The question raised by this record is, whether the public minister of a foreign state, accredited to and received by Her Majesty, having no real property in England, and having done nothing to disentitle him to the privileges generally belonging to such public minister, may be sued, against his will, in the Courts of this country, for a debt, neither his person nor his goods being touched by the suit, while he remains such public minister. The defendant is accredited to and received by Her Majesty as Envoy Extraordinary and Minister Plenipotentiary for the Republics of Guatemala and New Granada respectively; and a writ has been sued out against him and served upon him, to recover an alleged debt, for the purpose of prosecuting this action to judgment against him whilst he continues such public minister. He says, by his plea to the jurisdiction of the Court, that, by reason of his privilege as such public minister, he ought not to be compelled to answer. We are of opinion that his plea

is good, and that we are bound to give judgment in his favour. The great principle is to be found in Grotius, *de Jure Belli et Pacis*, lib. 2, c. 18, s. 9., "*Omnis coactio abesse a legato debet.*" He is to be left at liberty to devote himself body and soul to the business of his embassy. He does not owe even a temporary allegiance to the Sovereign to whom he is accredited, and he has at least as great privileges from suits as the Sovereign whom he represents. He is not supposed even to live within the territory of the Sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country. For these reasons, the rule laid down by all jurists of authority who have written upon the subject is, that an ambassador is exempt from the jurisdiction of the Courts of the country in which he resides as ambassador. Whatever exceptions there may be, they acknowledge and prove this rule. The counsel for the plaintiffs, admitting that the person of an ambassador cannot be lawfully imprisoned in a suit, and that his goods cannot be taken in execution, contended that he might be cited and impleaded; and he referred to the decision of the tribunal at the Hague, in 1720, which is reported by Bynkershoek, and was the cause of that great jurist writing his valuable treatise *De Foro Legatorum*. But this case is to be found in chap. xiv., entitled "*De Legato Mercatore*," in which is explained the exception of an ambassador engaging in commerce for his private gain. The Envoy Extraordinary of the Duke of Holstein to the States General, leaving the Hague, where he ought to have resided, "*Amsterdamum se confert, et strenuè mercatorem agit. Plurimum debitor factus, Hagam revertitur, sed et plures curiam Hollandiæ adeunt, et impetrant mandatum arresti et in jus vocationis.*" The arrest was granted to operate on all goods, money and effects within the jurisdiction of the tribunal, with the exception of the movables, equipages and other things belonging to him in his character of ambassador. But this citation was entirely in respect of his having engaged in commerce, and shews that otherwise he would not have been subject to the jurisdiction of the Dutch Courts. Lord Coke's authority (4 Inst. 153) was cited, where, writing of the privileges of an ambassador, having said that "for any crime committed *contra jus gentium*, as treason, felony, adultery, or any other crime which is against the law of nations, he loseth the privilege and dignity of an ambassador, as unworthy of so high a place,"

he adds, "and so of contracts that be good *jure gentium* he must answer here." There does not seem to be anything in the contract set out in this declaration contrary to the law of nations; but Lord Coke, who is so great an authority as to our municipal law, is entitled to little respect as a general jurist.

Mr. Bovill, being driven from his supposition that the writ in this case might be sued out only to save the Statute of Limitations, by the fact that it had been served upon the defendant, and by the allegation in the plea that it was sued out for the purpose of prosecuting this action to judgment, strenuously maintained that at all events the action could be prosecuted to that stage, with a view to ascertain the amount of the debt, and to enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister. But although this suggestion is thrown out in the discussion which took place in the Common Pleas, in *Taylor v. Best*, 14 Com. B. 487, 493, it is supported by no authority; the proceeding would be wholly anomalous; it violates the principle laid down by Grotius; it would produce the most serious inconvenience to the party sued; and it could hardly be of any benefit to the plaintiffs. In the first place, there is great difficulty in seeing how the writ can properly be served, for the ambassador's house is sacred, and is considered part of the territory of the sovereign he represents; nor could the ambassador be safely stopped in the street to receive the writ, as he may be proceeding to the Court of our Queen, or to negotiate the affairs of his Sovereign with one of her ministers. It is allowed that he would not be bound to answer interrogatories, or to obey a subpoena requiring him to be examined as a witness for the plaintiffs. But he must defend the action, which may be for a debt of 100,000*l*, or for a libel, or to recover damages for some gross fraud imputed to him. He must retain an attorney and counsel, and subpoena witnesses in his defence. The trial may last many days, and his personal attendance may be necessary to instruct his legal advisers. Can all this take place without "*coactio*" to the ambassador? Then, what benefit does it produce to the plaintiffs? There can be no execution upon it while the ambassador is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall. In countries where there may be a citation by seizure of goods, if an ambassador loses his privilege by engaging in commerce, he not only may be cited, but all his goods unconnected with his diplomatic functions may be

arrested to force him to appear, and may afterwards, while he continues ambassador, be taken in execution on the judgment.

Reference was frequently made during the argument to stat. 7 Anne. c. 12.; but it can be of no service to the plaintiffs. The 1st and 2nd sections are only declaratory of the law of nations, in conformity with what we have laid down; and the other sections, which regulate procedure, do not touch the extent of the immunity to which the ambassador is entitled. The Russian ambassador had been taken from his coach and imprisoned; but the statute cannot be considered as directed only against bailable process. The writs and processes described in the 3rd section are not to be confined to such as directly touch the person or goods of an ambassador, but extend to such as, in their usual consequences, would have this effect. At any rate, it never was intended by this statute to abridge the immunity which the law of nations gives to ambassadors, that they shall not be impleaded in the Courts of the country to which they are accredited. An argument was drawn from the course pursued in some instances of setting aside bail bonds given by persons having the privilege of ambassadors, or their servants, on filing common bail. This, perhaps, is as much as could reasonably be asked on a summary application to the Court, but does not shew that the action may not be entirely stopped by a plea regularly pleaded to the jurisdiction of the Court.

Some inconveniences have been pointed out as arising from this doctrine, which, we think, need not be experienced. If the ambassador has contracted jointly with others, the objection that he is not joined as a defendant may be met by shewing that he is not liable to be sued. As to the difficulty of removing an ambassador from a house of which he unlawfully keeps possession, DeWicquefort, and other writers of authority on this subject, point out that in such cases there may be a specific remedy by injunction. Those who cannot safely trust to the honour of an ambassador, in supplying him with what he wants, may refuse to deal with him without a surety, who may be sued; and the resource is always open of making a complaint to the government by which the ambassador is accredited. Such inconveniences are trifling, compared with those which might arise were it to be held that all public ministers may be impleaded in our municipal Courts, and that judgment may be obtained against them in all actions, either *ex contractu* or *ex delicto*. It certainly has not hitherto been expressly decided that a

public minister duly accredited to the Queen by a foreign state is privileged from all liability to be sued here in civil actions, but we think that this follows from well established principles, and we give judgment for the defendant.

Judgment for the defendant.

PARKINSON v. POTTER.

QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE OF ENGLAND.
1885.

Law Reports, 16 Q. B. D. 152.

Appeal from the Westminster County Court.

WILLS, J. The plaintiff in this case sues the defendant for parochial rates which he has paid, and which he contends he is entitled to be repaid by virtue of the defendant's covenant with him. The plaintiff is the owner and the defendant the lessee of a house, in respect of the occupation of which the rates were assessed. The defendant has assigned or sublet to Senhor Pinto de Basto, who is said to be an attaché of the Portuguese embassy and who has on that ground refused to pay them. Under a local act the landlord is liable in such a case; and the first question that arises is whether the person in question was entitled to the immunity which he has claimed.

The evidence that Senhor Pinto de Basto is an attaché to the Portuguese legation is slight, but I think there is evidence of the fact. . . .

An attaché is a well-known term in the diplomatic service. He forms part of the regular suite of an ambassador. He is classed by Calvo, the author of an elaborate French work on International Law, published in 1880, and written with admirable clearness and with a copiousness of historical illustration which makes his treatise most interesting as well as instructive, along with "Conseillers et Secrétaires," and he gives a common description of the functions of all three classes of officers as consisting in supporting the minister in all things in preparing and forwarding official despatches, in carrying out communications by word of mouth with the public administrative authorities of the country to which the minister is accredited,

in classifying and keeping charge of the archives of the mission, in ciphering and deciphering despatches, in making minutes of the letters which the minister may have to write, and similar services; and he treats the attaché as undoubtedly entitled to all the immunities accorded to the suite of an ambassador: Calvo, *International Law*, vol. i., p. 486.

One of these immunities, insisted upon by all writers on *International Law* with whose works I have any acquaintance, as beyond question, is the complete exemption from the jurisdiction of the Courts of the country to which the minister is accredited. They are all, so far as I have been able to ascertain, equally clear in the opinion that the exemption extends to the family and suite of the ambassador. "This immunity," says Wheaton, "extends not only to the person of the minister but to his family and suite, secretaries of legation and other secretaries, his servants, movable effects, and the house in which he resides": *International Law*, ed. 1863, p. 394. Again, "the wife and family, servants, and suite of the minister participate in the inviolability attached to his public character": *Ibid.* 397. For these propositions he quotes Grotius, Bynkershoek, Vattel, and Martens, and he treats these privileges as essential to the dignity of his sovereign and to the duties he is bound to perform. Martens says, "The exemption from civil jurisdiction, contentious and voluntary alike, is general, and belongs to ministers throughout the whole extent of the country in which they reside. They enjoy it for themselves, for their suite, and for their effects, in as far, be it always understood, as they do not travel out of their diplomatic character"; *Guide Diplomatique*, vol. i, p. 81. To the same effect is the statement by Calvo: "The staff of the mission, the wife and family of the diplomatic agent, participate in these prerogatives," and amongst the prerogatives there enumerated is that "he is exempt from the local jurisdiction of the country into which he is sent; no legal process can be brought against him before the tribunals of the place of his residence": vol. i, p. 381. "The person who enjoys extrterritoriality," says the German Bluntschli, "cannot be subjected to any impost": *International Law Codified*, art. 138. "The family, the staff, the suite, and the servants of him who has the right of extrterritoriality," says the same writer, "enjoy the same immunity as himself. His suite have the right but indirectly and on account of him to whom they are attached":

art. 145. "Such persons are exempt from jurisdiction": art. 147. "The immunity of the person exempted extends to the members of his suite": Heffter, *International Law of Europe*, sec. 42, VI. These are amongst the most recent French and German authorities upon the subject, and are for the most part subsequent to those cited in the elaborate arguments in *Taylor v. Best*, 14 C. B. 487, and *Magdalena Steam Navigation Co. v. Martin*, 2 E. & E. 94; and, so far as I have been able to ascertain, no writer on international law appears to entertain any doubt upon this point.

It was urged for the defendant that there are English authorities conflicting with these propositions. I do not think it is so, if they are carefully considered. It was said that in *Fisher v. Begrez*, 1 C. & M. 117, it was held that the goods of a chorister to the Bavarian embassy were not privileged from execution under a *fi. fa.*: but in that case the sheriff had not executed the *fi. fa.*; nor was the protection of the Court claimed by the ambassador or his servant. The sheriff claimed to be exempt from the duty of levying. The defendant had allowed himself to be sued and the action to proceed to judgment and execution without claiming the privilege, and the sheriff applied to the Court upon affidavits which were quite insufficient to show, and failed to satisfy the Court, that there was any foundation for the allegation that the defendant was then in the service of the Bavarian minister.

In *Novello v. Toogood*, 1 B. & C. 554, it was held that the goods of a chorister in the service of the Portuguese ambassador were not privileged from distress for poor-rates. But in that case the servant was carrying on the business of a lodging-house keeper in the house in question. Most writers on international law say that with regard to an ambassador even, although he does not lose his privileges as an ambassador by engaging in trade in the country to which he is accredited, yet the immunity of his goods does not extend to protect his stock in trade. The *ratio decidendi* in *Novello v. Toogood* is that the plaintiff *Novello*, who claimed exemption from poor-rate, was carrying on the business of a lodging-house keeper in the house in question.

An exception from the privilege of being exempt from jurisdiction is, by the statute of 7 Ann. c. 12, s. 5, specifically applied to the case of an ambassador's servant carrying on a trade; and in *Novello v. Toogood*, Abbott, C. J., so far from hinting a doubt

as to the general principle that the immunity from process extends to the servant of the ambassador, observes, "I do not say that he may not have a house fit and convenient for his situation as the servant of an ambassador, nor that the furniture in such a house will not be privileged." It may be added that Novello was a British-born subject, and that most writers on international law are of opinion that a subject of the country in which the ambassador is resident remains subject to the law of his country, and that in respect of him the immunity which would be afforded to a foreigner cannot be claimed. *Poitier v. Croza*, 1 Wm. Bl. 48, was cited, but in that case the court was convinced that the alleged service was a sham.

Reliance was placed on *Taylor v. Best*, 14 C. B. 487, 490. But the substance of the decision in that case was that, where the ambassador had voluntarily appeared as one of several defendants, and defended the action up to judgment, he had waived his privilege, and it was too late for him to apply to have all further proceedings stayed or to have his own name struck out of the record. It is true that Maule, J., expressed doubts as to whether an ambassador in England could claim a complete immunity from all English process. But that doubt was removed and pronounced to be ill-founded in the considered and elaborate judgment of the Court of Queen's Bench in *Magdalena Steam Navigation Co. v. Martin*, 2 E. & E. 94, in which it was held that the minister of a foreign country cannot be sued against his will in this country, although the action may arise out of commercial transactions carried on by him here. There is, therefore, nothing in the current of English authorities to contravene the doctrine of exemption from process—a part of the privileges which constitute the "extritoriality" of foreign jurists—as laid down by the writers on international law: and there is nothing in the circumstances of this case to prevent its application to *Senhor de Basto*. He is not carrying on trade nor letting lodgings; and the house in question is simply the private residence of himself and his family; and I am of opinion that he was not liable to pay the rates assessed upon him in respect of his occupation.

It follows that under s. 190 of the local Act the plaintiff, as the landlord of his house, was liable to pay them; and, having paid them, it is clear that, under the covenant sued upon, the defendant is bound to recoup him. The judgment of the county

court judge was right, therefore, and the appeal must be dismissed with costs.

Appeal dismissed.

[MATHEW, J., delivered a concurring opinion.]

IN RE REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LIMITED.

CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE OF ENGLAND. 1913.
Law Reports [1914] 1 Ch. 139.

Misfeasance Summons.

On May 7, 1912, the liquidator of the above company issued this summons against the directors, T. H. Myring, R. E. Lembcke, and Paul E. Vanderpump (since deceased), and the auditors Woodington and Bubb, claiming damages for various acts of misfeasance.

On the hearing of the summons R. E. Lembcke took the preliminary objection that as a second secretary of the Peruvian Legation he was entitled to diplomatic privilege.

The liquidator admitted that R. E. Lembcke was entitled to diplomatic privilege, but contended that he had waived it.

The facts relating to this point were as follows. On May 15, 1912, R. E. Lembcke entered an unconditional appearance to the summons, and on October 14, 1912, he issued a summons for further time to file evidence. On October 31, 1912, he swore an affidavit on the merits, stating his official position, but not raising any objection to the jurisdiction. On June 10, 1913, the case was mentioned in Court on an application by the liquidator to fix a time for hearing, and R. E. Lembcke's counsel then stated that he should insist on his diplomatic privilege. The objection was taken with the sanction and at the wish of the Peruvian Legation. . . .

ASTBURY J. . . . The liquidator admits that apart from the question of waiver R. E. Lembcke is privileged, and the question I have to decide is whether the summons shall proceed against him under the special circumstances of this case. . . .

The exact point, namely, whether a public minister sued individually and not as one of several joint contractors, as in *Taylor v. Best*, 14 C. B. 487, can waive his privilege, has not been

directly determined; but in *Barbuit's Case*, Cas. t. Tal. 281, Talbot L. C. expressed an opinion to the contrary, although the privilege was not claimed until ten years after action brought. Talbot L. C. said: "A bill was filed in this Court against the defendant in 1725 upon which he exhibited his cross bill, stiling himself merchant. On the hearing of these causes the cross bill was dismissed; and in the other, an account decreed against the defendant. The account being passed before the Master, the defendant took exceptions to the Master's report, which were overruled; and then the defendant was taken upon an attachment for non-payment, etc. And now, ten years after the commencement of the suit, he insists he is a public minister, and therefore all the proceedings against him null and void. Though this is a very unfavourable case, yet if the defendant is truly a public minister, I think he may now insist upon it; for, the privilege of a public minister is to have his person sacred and free from arrests, not on his own account, but on the account of those he represents; and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner as private persons, by agents, when they cannot meet themselves. And if the foundation of this privilege is for the sake of the prince by whom an ambassador is sent, and for sake of the business he is to do, it is impossible that he can renounce such privilege and protection: for, by his being thrown into prison the business must inevitably suffer." This passage, though only a dictum, as Barbuit was not in fact a public minister, is of very great weight.

The question before me is whether or no *Taylor v. Best*, 14 C. B. 487, is an absolute decision as to the possibility of waiver. I will first refer to the earlier dicta or decisions. In *Triquet v. Bath*, 3 Burr. 1478, 1480, Lord Mansfield said: "This privilege of foreign ministers and their domestic servants depends upon the law of nations. The Act of Parliament 7 Ann. c. 12 is declaratory of it. All that is new in this Act, is the clause"—s. 4—"which gives a summary jurisdiction for the punishment of the infractors of this law." In *Hopkins v. De Robeck*, 3 T. R. 79, 80, Buller J. said: "The statute of Ann is only explanatory of the law of nations; and the words 'domestic and domestic servant' are only put by way of example. The privilege was held, in the case in *Burrow*, 3 Burr. 1478, 1480, to extend to secretaries."

In *Taylor v. Best*, 14 C. B. 487, relied on by the liquidator, the

action was brought against Best, Drouet, Sperling, and Clarke as directors to recover 250*l*, paid as a deposit on shares. Drouet was in fact First Secretary of the Belgian Legation. Best, Drouet, and Sperling pleaded severally never indebted. Clarke suffered judgment by default. Notice of trial was given, and on December 8, 1853, Drouet obtained a rule for a special jury. Two days later he issued a summons calling upon the attorneys for the plaintiff and for the defendants Best and Sperling to shew cause why the action should not be stayed on the ground of diplomatic privilege. The plaintiff contended that the privilege had been waived. The exact facts of waiver relied on are stated in the plaintiff's argument, 14 C. B. 498, namely, "that, on the writ being issued, the plaintiff's attorney wrote to the defendant Drouet, to inquire the name of his solicitor to whom he should send the process for an undertaking to appear; that, in answer to such inquiry, he received a letter from the attorneys of M. Drouet, requesting that the writ might be sent to them for that purpose; that an appearance was duly entered, and that, after time obtained to plead, and after issue joined, a rule for a special jury was obtained on behalf of Drouet." Jervis C. J. said: "There is no doubt that the defendant Drouet fills the character of a public minister to which the privilege contended for is applicable; and I think it is equally clear, that, if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in the 7 Anne, c. 12, s. 5, in the case of an ambassador's servant. . . . Admitting, then, that M. Drouet is a person entitled to the privileges and immunities which the law of England accords to ambassadors from foreign friendly Courts, and that he does not forfeit them by engaging in commercial ventures,—the question is, whether he is, under all the circumstances disclosed by the affidavit before us, entitled to the privilege which he claims.

. . . The action is brought against four defendants,—the writ being sued out against M. Drouet and the three others as joint-contractors. No doubt, the plaintiff was bound, at the peril of a plea in abatement, to sue all. The writ being issued, nothing is done upon it which can at all interfere with the exercise by M. Drouet of his diplomatic functions, or with his personal comfort or dignity. But, knowing that a writ has issued, or having reason to believe that it is about to issue, he causes his attorney to write to the plaintiff's attorney, desiring that the

process may be sent to him for an undertaking to appear. He, therefore, voluntarily attorns and submits himself to the jurisdiction of the Court. Under these circumstances, I think he cannot be permitted now to complain that the suit has been improperly instituted against him. On the contrary, I think, that, by analogy to the doctrine cited from the learned jurists whose works have been so laboriously consulted, the action may well be maintained. It is said,—and perhaps truly said,—that an ambassador or foreign minister is privileged from suit in the Courts of the country to which he is accredited, or, at all events, from being proceeded against in a manner which may ultimately result in the coercion of his person, or the seizure of his personal effects necessary to his comfort and dignity; and that he cannot be compelled, *in invitum*, or against his will, to engage in any litigation in the Courts of the country to which he is sent. But all the foreign jurists hold, that, if the suit can be founded without attacking the personal liberty of the ambassador, or interfering with his dignity or personal comfort, it may proceed.” It is clear that that view of the foreign jurists is not the law of this country. . . . “I do not feel myself at all pressed by the argument urged by Mr. Willes, that the privilege in question being the privilege of the Sovereign, cannot be abandoned or waived by the ambassador: for, when the authorities upon which that argument is sought to be sustained, come to be examined, they do not shew that the ambassador may not submit himself to the jurisdiction, for the purpose of having the matter in difference investigated and ascertained; but only that the sacred character of the person of the ambassador cannot be affected by any act or consent on his part; and that, by interfering with the person of the ambassador, or with the goods which are essential to the personal comfort and dignity of his position, you are in effect attacking the privilege of his master. That, however, is not the case here:”—then follows a very important passage—“for anything that appears, M. Drouet is sued,—he being a joint-contractor, and so a necessary party to the action,—merely for the purpose of ascertaining the liability of the other defendants. If he had not thought fit to attorn to the jurisdiction, but had allowed judgment to go against him by default, *non constat* that anything would have been done upon the judgment, otherwise than by enforcing it against the other defendants. If any *ca. sa.* or *fi. fa.* were issued against him upon the judgment, the statute of Anne would have applied,

and the Court might have been called upon to interfere to prevent its being put in force against him. It seems to me that M. Drouet here has courted the jurisdiction, and that we ought not to interfere." Then Maule J. says: "I am of opinion, that, as M. Drouet has voluntarily appeared to the action, and allowed it to go on through several stages, so that the application could not be granted without prejudice to the rights of the other defendants, as well as to those of the plaintiff, the present motion ought not to succeed." Of course that point does not apply here, as the liquidator can go on against the other defendants. . . . After referring to the cases of applications on behalf of domestic servants of ambassadors, Maule J. proceeds: "These cases do not in any degree determine the point which has been attempted to be raised on the present occasion,—and undoubtedly it is a point which is very fit to be considered whenever it may be properly presented for decision,—viz. Whether an ambassador or public minister can be brought into Court against his will, by process not immediately affecting either his person or his property, and have his rights and liabilities ascertained and determined. Unquestionably it must to a certain extent interfere with the ambassador's comfort to have his rights in any way made the subject of litigation; and therefore it may well be that the privilege he enjoys is as large and extensive as Mr. Justice Blackstone affirms it to be. But it is unnecessary to determine that question upon the present occasion,"—it has since been absolutely determined—"because, whatever may be the extent of the ambassador's privilege in that respect, I think, that, where he is sued jointly with others, and appears to the process, and allows the suit to go on to an advanced stage without offering any objection, and where there does not appear to be any intention on the part of the plaintiff to interfere with either the person or the property of the ambassador, and where the action may proceed to its ultimate termination without any such molestation or interference, we should do wrong to give effect to a claim of privilege which has been so abandoned by the voluntary act of the party."

Before passing on it is necessary to observe that this is a decision of the Court of Common Pleas that in certain cases and in certain ways and to a certain extent a diplomatic agent can waive his privilege, and that in the particular case before that Court Drouet was a joint contractor, treated as a necessary party, and it did not appear that the plaintiff intended to en-

force any remedy against him, or that he was more than a formal defendant. Having appeared and taken steps and allowed the action to go through several stages he was not allowed subsequently to insist on his privilege so as to cause the action to abate to the prejudice of the plaintiff and his codefendants who had incurred expense in reliance on his apparent waiver. It was under those special circumstances that the Court held the privilege had been waived. . . .

[The learned judge here discusses *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 94.]

In *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533; 2 Q. B. 352, the plaintiff as executor of the Turkish ambassador Musurus Pacha was interested in arguing that the ambassador's privilege was not absolute. In the Divisional Court Wright J. said: "To some extent, the point raised to-day is new. It is this: Admitting that Musurus Pacha, whilst he retained his privilege, could not have been sued to judgment or execution, still it is said that a writ could have been issued against him for the purpose of avoiding the application of the Statute of Limitations, and, therefore, that the statute began to run whilst he was in England."—That refers to the issue of an ordinary writ.—"We think, on the whole, that we ought to follow the indication of opinion of Lord Campbell in *Magdalena Steam Navigation Co. v. Martin*, 2 E. & E. 94, (to the effect that the statute 7 Anne, c. 12, prohibits and makes null and void the issue of any writ or process against an ambassador, and not merely writs or processes in the nature of writs of execution.) Several passages in the judgments of the Court of Appeal must also be referred to. A. L. Smith L. J. said, [1894] 2 Q. B. 351, that the plaintiff's counsel "did not assert, for this would have been useless, that Musurus Pacha could have been effectively sued during the period he was *de facto* ambassador in London, for the case of *Magdalena Steam Navigation Co. v. Martin* which has never since been doubted, settled that he could not, as during that period he was exempt from the jurisdiction of the Courts of this country." And later he said: "The writs and processes mentioned in the Act are not confined to such as directly touch the person or goods of an ambassador, but extend to such as in their usual consequences would have this effect as was held in the *Magdalena Steam Navigation Co.* Case above cited." He then read the passage from Lord Campbell's judgment as to forfeiture or waiver to which I have already referred. Again,

in dissenting from the contention that to issue a writ without serving it would have been no breach of the ambassador's privilege, and that therefore a writ might have been issued for the purpose of saving the statute, and have been renewed from time to time, Davey L. J. said: "It is in my opinion sufficient to refer to the 3rd section of 7 Anne, c. 12, which makes all writs and processes, whereby the person of any ambassador or other public minister may be arrested or imprisoned, or his goods and chattels may be distrained, seized, or attached, utterly null and void. It has been decided in *Magdalena Steam Navigation Co. v. Martin*, 2 E. & E. 94, that this section applies not only to writs of execution against the property or person of a privileged person, but also to writs which lead up to and would in ordinary course have the consequence of attaching his goods or person. If so, I am of opinion that a writ of summons in an action is of that character, and that the effect of the statute (which is said to be declaratory only of the common law) is to make such a writ void and of no effect. Mr. Pollard is quite right in saying that the writ had been served in the *Magdalena Case* and that all that it was necessary to decide was that the service was bad. But the grounds upon which the decision was based in Lord Campbell's judgment go beyond that point, and in my opinion shew a total want of jurisdiction of the Court to entertain the action at all." After referring to passages in that judgment Davey L. J. proceeds, [1894] 2 Q. B. 361: "These passages, in my opinion, correctly state the legal principles on which the exemption is founded, and are in accordance with the course of decisions in our Courts: see, for example, the latest case of *The Parlement Belge* (1880), 5 P. D. 197, in the Court of Appeal, in which it was said (I am reading from the marginal note, which is fully borne out by the judgment) that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any Sovereign or ambassador, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such Sovereign, ambassador, or property be within its territory. I am unable to think that the issue of a writ in an action which action the Court has no jurisdiction to entertain, and which writ, therefore, the Court has no juris-

diction to issue, can prevent the statute running. . . . I am therefore of opinion that Gadban and Watson, or Gadban or his executors, could not have properly issued a writ against Musurus Pacha or (in other words) had no right of action against him while he was ambassador. The doubts suggested in *Taylor v. Best* cannot in my opinion be supported." He is referring to the doubts on the question of absolute privilege.

In the course of his able argument Mr. Clauson referred to *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149, 159. . . .

There is one other dictum to which I must refer. In *Fisher v. Begrez*, 2 Cr. & M. 240, 242, 243, an ambassador's servant was arrested for debt. He paid the money immediately upon his arrest without protest; and upon being asked by the sheriff's officer whether he intended to make any application, he said he did not, and the sheriff in due course paid over the money. Five months later the defendant obtained a rule calling on the plaintiff and the sheriff to shew cause why the *ca. sa.* should not be set aside and the money returned. The ambassador refused to interfere. In the course of the argument Lord Lyndhurst C. B. said: "A party may waive his privilege, and if he pays the money without insisting on his privilege, does he not thereby waive it? Besides, it is sworn that he expressly said, he should not make any application." This was properly relied on as a dictum in favour of the possibility of waiver. In his judgment Bayley B. said: "The privilege is not the privilege of the servant, but of the ambassador. This application is not made on behalf of the ambassador, or of any one connected with him; but on behalf of the defendant alone." In that case it is to be observed that the servant said he should not claim privilege, and the ambassador refused to claim it on his behalf. In other words he refused to acknowledge the servant as within the privilege. The decision does not touch the question of waiver by a privileged person.

It seems to me that both at common law and under the statute all writs against foreign public ministers accredited to the Court of this country are absolutely null and void, and that if and so far as waiver of that diplomatic privilege is possible it must be confined to cases of some very special nature as was the case in *Taylor v. Best*, 14 C. B. 487. The question is whether R. E. Lembcke's conduct brings him within that decision. I have felt considerable difficulty as to this. No doubt he entered an unconditional appearance, asked for further time to file evidence,

and filed evidence on the merits stating his official position, but not raising any question of privilege. Has he thereby waived his privilege? It seems to me that on this question there are three matters to be considered. In the first place, having regard to the earlier cases as to the absolute nullity of proceedings against foreign public ministers I am satisfied that waiver, if it be possible, must be strictly proved. It implies a knowledge of the rights waived, and I am not satisfied that R. E. Lembecke when he entered appearance and took the subsequent steps was aware of his privilege. Secondly, knowledge of our common and statute law cannot be imputed to a foreign subject residing here as diplomatic agent of a foreign State. Thirdly, I am far from satisfied that a subordinate secretary can effectually waive his privilege without the sanction of his Sovereign or Legation, and it is clear that, whatever knowledge R. E. Lembecke possessed, the objection on the ground of privilege is now taken with the sanction and at the instigation of the Peruvian Legation.

To some extent my view is supported by *The Jassy*, [1906] P. 270, 273, which was a motion to dismiss an action for damage by collision on the ground that the vessel proceeded against was the property of a foreign sovereign State and destined to its public use. On March 6, 1906, the plaintiffs issued a summons *in rem* addressed to the owners of the *Jassy*, and on March 18 the *Jassy* was arrested at Liverpool, but released on an undertaking to put in bail given by solicitors acting for the owners' agents. On March 22 appearance for the owners was entered, and on April 12 the owners raised the question of privilege. Gorell Barnes P. said: "The result is that the principle laid down in *The Parlement Belge*, 5 P. D. 197, applies, in spite of the undertaking to put in bail and appearance entered by some agent in Liverpool without the knowledge of the Roumanian Government and under a misapprehension as to the privilege enjoyed by a sovereign State in respect of the immunity of its public vessels from arrest. The action will be dismissed with costs."

There is one other matter to be considered. Whatever be the true view of R. E. Lembecke's conduct in entering appearance and taking the subsequent steps, it is clear that the summons must prove abortive against him. No judgment or execution can be enforced or levied against him, and the authorities shew

the impropriety of allowing the action to go on merely for the purpose of defining his liability.

On the grounds above stated I am of opinion that there has been no effective waiver established in this case and that the plea of privilege must prevail with costs since June 10, 1913, when the objection was first taken.

NOTE.—The immunities of diplomatic agents are based upon international law, *Heathfield v. Chilton* (1767), 4 Burrow, 2015, but municipal legislation may be enacted for their better protection. In Lord Coke's time it seems to have been thought that an ambassador might be held liable on his civil contracts. In 1708 Peter the Great's ambassador in London was arrested in an action for debt and was compelled to give bail. The Czar's indignation was extreme, and as a means of appeasing him and "as an apology and humiliation from the whole nation," the famous statute of Anne (7 Anne, 12) was enacted and a finely illuminated copy was sent to the Czar by a special ambassador. In *Triquet v. Bath* (1764), 3 Burrow, 1478, Lord Mansfield said that the statute was merely declaratory of the law of nations. "All that is new in this Act," he said, "is the clause which gives a summary jurisdiction for the punishment of the infractors of this law." This statute, in substantially the same terms, was adopted by the American Congress in 1790 and is incorporated in the Revised Statutes in the following form:

Sec. 4063. Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.

Sec. 4064. Whenever any writ or process is sued out in violation of the preceding section, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations, and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined in the discretion of the court.

Diplomatic privilege is not a personal right which the holder for the time being is at liberty to waive as his judgment or caprice may indicate. It is accorded to him for the purpose of facilitating the transaction of the business of his government, and hence it should be waived only by a representative of the public authority who is competent to pass upon the public interests involved. Since an ambassador's commission asks that full credit be given him, a court may dispense with proof that in waiving his immunity he is acting with the consent of his government, but it may reasonably require

a definite statement from him to that effect. When the Venezuelan Minister to the United States appeared as a witness at the trial of the assassin of President Garfield in 1882, the court was informed that he appeared by instruction of his government, Moore, *Digest*, IV, 644. Subordinate members of a mission may waive their immunity only with the consent of the chief of mission, which should be formally notified to the court. If a diplomat's waiver of his immunity is made for reasons which do not commend themselves to his colleagues in the diplomatic corps, they may make a protest to him, since an unwarranted waiver weakens the position of all and may make it more difficult to maintain a safeguard which is so important in the discharge of their functions. On the other hand, it may be advantageous to an ambassador to waive his immunity in order to obtain a judicial determination of points at issue, and his right to do so with the consent of his government is well recognized, Taylor v. Best (1854), 14 C. B. 487; In re Suarez [1917] 2 Ch. 131; (1918) 1 Ch. 176. The immunity of a diplomat continues for a sufficient time after the termination of his appointment to give him a reasonable opportunity to wind up his affairs, Musurus Bey v. Gadban, [1894] 2 Q. B. 352. While a diplomat is not subject to process in the country to which he is accredited, that country is not helpless in the presence of those who break its laws or whose conduct is otherwise offensive. In a proper case the recall of such offenders may be requested, and if it is not granted they may be expelled. The latter however is an extreme remedy. A country which accepts one of its own citizens as the diplomatic representative of another country must accord to him the usual immunity unless, at the time of his reception, it stipulates that he is to remain under the jurisdiction to which he owes allegiance, Macartney v. Garbut (1890), 24 Q. B. D. 368. In the United States, diplomatic status is not accorded to appointees of foreign governments who are American citizens.

As a further concession to international comity and in order to enable an ambassador to discharge his functions without interruption his immunity extends to his family and household, United States v. Liddle (1808), 2 Washington C. C. 205; Republica v. DeLongchamps (1784), 1 Dallas (Pa.), 111, and to his official residence, United States v. Hand (1810), Federal Cases, No. 15297. But this does not prevent the territorial authority from taking jurisdiction over acts committed in an embassy or legation by a person not possessing diplomatic immunity or by one who has waived his immunity. In case of refusal to surrender such an offender, coercive measures might be employed, Hyde, I, 760; Moore, *Digest*, IV, 555. The granting of asylum, except in very exceptional cases, is now generally condemned. See J. B. Moore, "Asylum in Legations and Consulates and in Vessels," *Pol. Sci. Quar.*, VII, 1, 197, 397; Hyde, I, 760; Moore, *Digest*, II, 755. As to the immunity of a diplomatic agent in a country to which he is not accredited, see New Chile Gold Mining Co. v. Blanco (1888), 4 T. L. R. 346; Wilson v. Blanco (1889), 56 N. Y. Super. Ct. 582. As to the position of a belligerent's ambassador to a neutral state, see The *Caroline* (1807), 6 C. Robinson, 461, 467.

Consuls do not possess diplomatic status and are not accorded diplomatic immunity. In *re Balz*, (1890), 135 U. S. 403. They are therefore not exempt from civil and criminal process in the state where they reside, *Viveash v. Becker* (1814), 3 M. & S. 284; *Rex v. Ahlers* (1914), L. R. [1915] 1 K B. 616; *United States v. Ravara* (1793), 2 Dallas, 297; *The Anne* (1818), 3 Wheaton, 435; *Coppell v. Hall* (1869), 7 Wallace, 542; but although a consul is subject to indictment and arrest the documents in the consular archives are privileged and a witness may not be compelled to disclose their contents, *Kessler v. Best* (1903), 121 Fed. 439. Since he does not possess a diplomatic character, a consul of a neutral state residing and doing business in enemy territory is subject to the disabilities of an enemy, *The President* (1804), 5 C. Robinson, 277; *The Falcon* (1805), 6 C. Robinson, 194; *Albrecht v. Sussman* (1813), 2 V. & B. 323.

The distinction between diplomats and consuls has not always been sharply drawn. This is shown in the provision in the Constitution of the United States by which the Supreme Court is given original jurisdiction "in all cases affecting ambassadors, other public ministers and consuls," in the act of Congress by which the Federal courts are given exclusive jurisdiction in civil or criminal proceedings against ministers or consuls, and in the many treaties in which provision is made for special immunities for consuls, which however are often restricted to consuls who are citizens of the countries for which they act, *Börs v. Preston* (1884), 111 U. S. 252. Since a consul's exemption from the jurisdiction of State courts is conferred for the facilitating of the work of his office, he may not waive it, *Davis v. Packard* (1833), 7 Peters, 276, (1834), 8 Peters, 312. It is probable that the reasonable time allowed to a diplomat for winding up his affairs and leaving the country would not apply to a consul's exemption from process in State courts. In *People v. Savitch* (1921), 190 N. Y. Supp. 759, it was held that upon the revocation of a consul's exequatur, he became indictable in a State court for crimes committed while consul.

For further discussion of diplomatic immunity and the status of consuls see Hershey, *Diplomatic Agents and Immunities*; van Praag, *Jurisdiction et Droit International Public*, 453-490; Satow, *A Guide to Diplomatic Practice*, I; Stowell, *Le Consul and Consular Cases and Opinions*; "The Immunity of Consuls from the Process of State Courts", *Harvard Law Review*, XXXV, 752; Cobbett, *Cases and Opinions*, I, 305; Hyde, I, 746 *seq.*, 785 *seq.*; Bonfils (Fauchille), sec. 684; Moore, *Digest*, IV, 630; V. 1.

SECTION 3. PUBLIC PROPERTY.

THE SCHOONER EXCHANGE v. M'FADDON & OTHERS.

SUPREME COURT OF THE UNITED STATES. 1812.

7 Cranch, 116.

Appeal from the Circuit Court of the United States for the district of Pennsylvania.

[The schooner Exchange, belonging to John M'Faddon and William Greetham, citizens of Maryland, while on a voyage from Baltimore to Spain in December, 1810, was seized in pursuance of the Rambouillet Decree by officers of the Emperor Napoleon, taken to France, converted into a public vessel, and given the name Balaou. The vessel having put into Philadelphia in July, 1811, her original owners filed a libel praying that she be attached and returned to them. Thereupon the United States District Attorney suggested to the court that the vessel was a public vessel, the property of a power with which the United States was at peace, and consequently not within the jurisdiction of the court. The decision of the District Court dismissing the libel having been reversed by the Circuit Court, an appeal was taken to this court.]

MARSHALL, CH. J. delivered the opinion of the Court as follows:

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any aids, from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limita-

tion not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its own sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either expressed or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood

to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case.

Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the Court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose Court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It is true that in some countries, and in this among others a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn

from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license, would be in like manner conferred by such general permit.

We have seen that a license to pass through a territory implies immunities not expressed, and it is material to inquire why the license itself may not be presumed?

It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privileges by its irregular conduct. It may however well be questioned whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without a special license, into a friendly port. A different rule therefore with respect to this species of military force has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted, any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the Court for distinguishing their case from that of vessels which enter by express assent.

In all cases of exemption which have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the Court will not attempt to evade.

Those treaties which provide for the admission and safe de-

parture of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly with much plausibility if not correctness, that the same rule and same principle are applicable to public and private ships; and since it is admitted that private ships entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

It is by no means conceded, that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating, and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the Court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be pre-judged.

Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted, that the whole reasoning upon which such exemption has been implied in other cases, applies with full force to the exemption of ships of war in this.

"It is impossible to conceive," says Vattel, "that a Prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the con-

struction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

To the Court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign;

is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is intrusted to govern.

The only applicable case cited by Bynkershoek, is that of the Spanish ships of war seized in Flushing for a debt due from the king of Spain. In that case, the states general interposed; and there is reason to believe, from the manner in which the transaction is stated, that, either by the interference of government, or the decision of the court, the vessels were released.

This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at

once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships would appear to proceed from the same opinion.

It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.

The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length, which forbids a particular examination of these points.

The principles which have been stated, will now be applied to the case at bar.

In the present state of the evidence and proceedings, the *Exchange* must be considered as a vessel which was the property of the Libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the

service of the emperor of France. The evidence of this fact is not controverted. But it is contended, that it constitutes no bar to an inquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our Courts, has a right to assert his title in those Courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the Court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country. . . .

I am directed to deliver it, as the opinion of the Court, that the sentence of the Circuit Court, reversing the sentence of the District Court, in the case of the Exchange be reversed, and that of the District Court, dismissing the libel, be affirmed.

THE PARLEMENT BELGE.

THE COURT OF APPEAL OF ENGLAND. 1880.
Law Reports, 5 P. D. 197

BRETT, L. J. In this case proceedings *in rem* on behalf of the owners of the Daring were instituted in the Admiralty Division, in accordance with the forms prescribed by the Judicature Act, against the Parlement Belge, to recover redress in respect of a collision. A writ was served in the usual and prescribed manner on board the Parlement Belge. No appearance was entered, but the Attorney-General, in answer to a motion to direct that judgment with costs should be entered for the plaintiffs, and that a warrant should be issued for the arrest of the Parlement Belge, filed an information and protest, asserting that the

Court had no jurisdiction to entertain the suit. Upon the hearing of the motion and protest the learned judge of the Admiralty Division overruled the protest and allowed the warrant of arrest to issue. The Attorney-General appealed. The protest alleged that the Parlement Belge was a mail packet running between Ostend and Dover, and one of the packets mentioned in Article 6 of the Convention of the 17th of February, 1876, made between the sovereigns of Great Britain and Belgium; that she was and is the property of his Majesty the King of the Belgians, and in his possession, control, and employ as reigning sovereign of the state, and was and is a public vessel of the sovereign and state, carrying his Majesty's royal pennon, and was navigated and employed by and in the possession of such government, and was officered by officers of the Royal Belgian navy, holding commissions, &c. In answer it was averred on affidavits, which were not contradicted, that the packet boat, besides carrying letters, carried merchandise and passengers and their luggage for hire.

Three main questions were argued before us: (1.) Whether, irrespective of the express exemption contained in Article 6 of the Convention, the Court had jurisdiction to seize the Belgian vessel in a suit *in rem*; (2.) whether, if the Court would otherwise have such jurisdiction, it was ousted by Article 6 of the Convention; (3.) whether any exemption from the jurisdiction of the Court, which the vessel might otherwise have had, was lost by reason of her trading in the carriage of goods and persons. In the course of the argument we desired that it might, in the first instance, be confined to the first and third questions, reserving any further argument on the second question to be heard subsequently, if necessary. We have come to the conclusion that no such argument is necessary. We, therefore, give no opinion upon the second question. We neither affirm nor deny the propriety of the judgment of the learned judge of the Admiralty Division on that question.

The proposition raised by the first question seems to be as follows: Has the Admiralty Division jurisdiction in respect of a collision to proceed *in rem* against, and, in case of non-appearance or omission to find bail, to seize and sell, a ship present in this country, which ship is at the time of the proceedings the property of a foreign sovereign, is in his possession, control, and employ as sovereign by means of his commissioned officers, and is a public vessel of his state, in the sense of its being used for

purposes treated by such sovereign and his advisers as public national services, it being admitted that such ship, though commissioned, is not an armed ship of war or employed as a part of the military force of his country? On the one side it is urged that the only ships exempted from the jurisdiction are armed ships of war, or ships which, though not armed, are in the employ of the government as part of the military force of the state. On the other side it is contended that all moveable property, which is the public property of a sovereign and nation used for public purposes, is exempt from adverse interference by any court of judicature. It is admitted that neither the sovereign of Great Britain nor any friendly sovereign can be adversely personally impleaded in any court of this country. It is admitted that no armed ship of war of the sovereign of Great Britain or of a foreign sovereign can be seized by any process whatever, exercised for any purpose, of any court of this country. But it is said that this vessel, though it is the property of a friendly sovereign in his public capacity and is used for purposes treated by him as public national services, can be seized and sold under the process of the Admiralty Court of this country, because it will, if so seized and sold, be so treated, not in a suit brought against the sovereign personally, but in a suit *in rem* against the vessel itself. This contention raises two questions: first, supposing that an action *in rem* is an action against the property only, meaning thereby that it is not a legal proceeding at all against the owner of the property, yet can the property in question be subject to the jurisdiction of the Court? Secondly, is it true to say that an action *in rem* is only and solely a legal procedure against the property, or is it not rather a procedure indirectly, if not directly, impleading the owner of the property to answer to the judgment of the Court to the extent of his interest in the property?

The first question really raises this, whether every part of the public property of every sovereign authority in use for national purposes is not as much exempt from the jurisdiction of every Court as is the person of every sovereign. Whether it is so or not depends upon whether all nations have agreed that it shall be, or in other words, whether it is so by the law of nations. The exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations. An equal exemption from interference by any process of any Court of some property of every sovereign is admitted to be a

part of the law of nations. The universal agreement which has made these propositions part of the law of nations has been an implied agreement. Whether the law of nations exempts all the public property of a state which is destined to the use of the state, depends on whether the principle, on which the agreement has been implied, is as applicable to all that other public property of a sovereign or state as to the public property which is admitted to be exempt. If the principle be equally applicable to all public property used as such, then the agreement to exempt ought to be implied with regard to all such public property. If the principle only applies to the property which is admitted to be exempt, then we have no right to extend the exemption.

The first question, therefore, is—What is the principle on which the exemption of the person of sovereigns and of certain public properties has been recognized? "Our king," says Blackstone (B. 1, c. 7), "owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the king, even in civil matters, because no Court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would be vain and idle without an authority to redress, and the sentence of a Court would be contemptible unless the Court had power to command the execution of it, but who shall command the king?" In this passage, which has been often cited and relied on, the reason of the exemption is the character of the sovereign authority, its high dignity, whereby it is not subject to any superior authority of any kind. "The world," says Wheaton, adopting the words of the judgment in the case of *The Exchange*, 7 Cranch, 116, "being composed of distinct sovereignties, possessing equal rights and equal independence, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers." "This perfect equality and absolute independence of sovereigns has given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation." "One of these is the exemption of the person of the sovereign from arrest or detention within a foreign territory. Why have the whole world concurred in this? The answer cannot be mistaken. A foreign sovereign is not under-

stood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation." By dignity is obviously here meant his independence of any superior authority. So Vattel, Lib. 4, c. 7, s. 108, speaking of sovereigns, says:—"*S'il est venu en voyageur, sa dignité seule, et ce qui est dû à la nation qu'il représente et qu'il gouverne, le met à couvert de toute insulte, lui assure des respects et toute sorte d'égards, et l'exempte de toute juridiction.*"

In the case of *The Duke of Brunswick v. The King of Hanover*, 6 Beav. 1, the suit was against the king. There was a demurrer to the jurisdiction. Lord Langdale in an elaborate judgment allowed the demurrer. He rejected the alleged doctrine of a fictitious extraterritoriality; he admitted that there are some reasons which might justify the exemption of ambassadors which do not necessarily apply to a sovereign, but he nevertheless adopted an analogy between the cases of the ambassadors and the sovereign, and allowed the demurrer on the ground that the sovereign character is superior to all jurisdiction. "After giving to the subject," he says, 6 Beav. 1, at p. 50, "the best consideration in my power, it appearing to me that all the reasons upon which the immunities of ambassadors are founded do not apply to the case of sovereigns, but that there are reasons for the immunities of sovereign princes, at least as strong if not much stronger than any which have been advanced for the immunities of ambassadors; that suits against sovereign princes of foreign countries must, in all ordinary cases in which orders or declarations of right may be made, and in requests for justice, which might be made without any suit at all; that even the failure of justice in some particular cases would be less prejudicial than attempts to obtain it by violating immunities thought necessary to the independence of princes and nations, I think that on the whole it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince resident in the dominions of another is exempt from the jurisdiction of the Courts there."

From all these authorities it seems to us, although other reasons have sometimes been suggested, that the real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity,—that is to say, with his absolute independence of every superior authority. By a similar examination of authorities we come to

the conclusion, although other grounds have sometimes been suggested, that the immunity of an ambassador from the jurisdiction of the Courts of the country to which he is accredited is based upon his being the representative of the independent sovereign or state which sends him, and which sends him upon the faith of his being admitted to be clothed with the same independence of and superiority to all adverse jurisdiction as the sovereign authority whom he represents would be. . . . [The learned judge here discusses *The Exchange*, 7 Cranch 116; *The Prins Frederik*, 2 Dod. 451; *The Athol*, 1 Wm. Rob. 374; and *Briggs v. The Lightships*, 11 Allen, 157.]

The judgment of Lord Campbell in *De Haber v. The Queen of Portugal*, 17 Q. B. 171, seems to the same effect, though the decision may fairly be said to apply only to a suit directly brought against the sovereign. But he relies on the Statute of Anne with regard to ambassadors, and says, "Can we doubt that in the opinion of that great judge (Lord Holt) the sovereign himself would have been considered entitled to the same protection, immunity, and privilege as the minister who represents him." And he cites the statute thus: "It has always been said to be merely declaratory of the law of nations recognised and enforced by our municipal law, and it provides that all process whereby the person of any ambassador or of his domestic servants may be arrested, *or his goods distrained or seized* shall be utterly null and void." The italics are as written by Lord Campbell. And further, citing *The Prins Frederik*, 2 Dod. 451, he says, "Objection being made that the Court had no jurisdiction, a distinction was attempted that the salvors were not suing the King of the Netherlands, and that being in possession of and having a lien upon a ship which they had saved, the proceeding might be considered *in rem*. But Lord Stowell saw such insuperable difficulties in judicially assessing the amount of salvage, the payment of which was to be enforced by sale, that he caused representation to be made to the Dutch Government, who very honourably consented to his disposing of the matter as an arbitrator." The decision therefore is that the immunity of the sovereign is at least as great as the immunity of an ambassador, but as the statute declares that the law is, and always has been, not only that an ambassador is free from personal suit or process, but that his goods are free from such process as distress or seizure, the latter meaning

seizure by process of law, it follows that the goods of every sovereign are free from any seizure by process of law.

The latest case on the point seems to be the case of *Vavasour v. Krupp*, 9 Ch. D. 351, before this Court. The question was whether the English Court had jurisdiction to order "shells" belonging to the Mikado of Japan to be destroyed, supposing they were an infringement of the plaintiff's patent. All the judges held that there was no such jurisdiction. "I suppose," says James, L.J., "that there is a notion that in some way these shells became tainted or affected through the breach or attempted breach of the patent, but even then a foreign sovereign cannot be deprived of his property because it has become tainted by the infringement of somebody's patent. He says, 'It is my public property, and I ask you for it.' That seems to me to be the whole of the case." Brett, L.J., said, "The goods were the property of the Mikado. They were his property as a sovereign—they were the property of his country." "I shall assume, for this purpose, that there was an infringement of the patent, yet the Mikado has a perfect right to have these goods; no Court in this country can properly prevent him from having goods which are the public property of his own country." And Cotton, L.J., says, "This Court has no jurisdiction, and in my opinion none of the Courts in this country have any jurisdiction to interfere with the property of a foreign sovereign, more especially with what we call the public property of the state of which he is sovereign, as distinguished from that which may be his own private property. The Courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented, as all foreign countries having a sovereign are represented, by the individual who is the sovereign."

The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory,

and, therefore, but for the common agreement, subject to its jurisdiction. . . .

This proposition would determine the first question in the present case in favour of the protest, even if an action *in rem* were held to be a proceeding solely against property and not a procedure directly or indirectly impleading the owner of the property to answer to the judgment of the Court. But we cannot allow it to be supposed that in our opinion the owner of the property is not indirectly impleaded. . . . To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court.

But it is said that the immunity is lost by reason of the ship having been used for trading purposes. As to this, it must be maintained either that the ship has been so used as to have been employed substantially as a mere trading ship and not substantially for national purposes, or that a use of her in part for trading purposes takes away the immunity, although she is in possession of the sovereign authority by the hands of commissioned officers, and is substantially in use for national purposes. Both these propositions raise the question of how the ship must be considered to have been employed.

As to the first, the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of *The Exchange*, 7 Cranch, 116. Whether the ship is a public ship used for national purposes seems to come within the same rule. But if such an inquiry could properly be instituted it seems clear that in the present case the ship has been mainly used for the purpose of carrying the mails, and only subserviently to that main

object for the purposes of trade. The carrying of passengers and merchandise has been subordinated to the duty of carrying the mails. The ship is not in fact brought within the first proposition. As to the second, it has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the state which he represents. If the remedy sought by an action *in rem* against public property is, as we think it is, an indirect mode of exercising the authority of the Court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner. The property cannot upon the hypothesis be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore, we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity. For all these reasons we are unable to agree with the learned judge, and have come to the conclusion that the judgment must be reversed.

Appeal allowed.

ANNIE B. MASON v. INTERCOLONIAL RAILWAY OF
CANADA & TRUSTEES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1908.
197 Massachusetts, 349.

KNOWLTON, C. J. This is an action brought by a trustee process to recover damages for personal injuries. . . . It appears that the so called defendant, the Intercolonial Railway of Canada, is the property of His Majesty, Edward VII., King of the United Kingdom of Great Britain and Ireland, in the right of his Dominion of Canada, and is not a corporation. . . . It appears that no subject, private individual or corporation has any interest or concern by way of property or direction in the ownership or working of the Intercolonial Rail-

way, but that it is owned, and operated by the King through his government of Canada, for the public purposes of Canada. All income arising from the operation of it is, by the laws of Canada, appropriated to the consolidated revenue fund of Canada, upon which fund all the expenses of the government of Canada are chargeable. All moneys and income due by reason of the operation or business of the railway are chargeable as belonging to the King, and are collectible in his name. . . . The cost of maintenance and operation of this railway is provided for by appropriation of the parliament of Canada out of the consolidated revenue fund, and all the receipts from the working of the railway are a part of the moneys of Canada, appropriated to the consolidated revenue fund, and are not used for the maintenance or operation of the railway, except as the receipts from customs or excise duties or from any other branch of the public service are so used. . . .

The question at once arises whether the court has jurisdiction of a suit which is virtually against the king of a foreign country. An answer in the negative comes almost as quickly.

The general subject of the immunity of the sovereign power from the jurisdiction of its own court was considered and discussed at great length by Mr. Justice Gray, in *Briggs v. Lightboats*, 11 Allen, 157, and, after an exhaustive review of the authorities, it was held that the action could not be maintained because the lightboats were the property of the United States, a sovereign power. Incidentally the question whether the public property of a foreign sovereign is exempt from the jurisdiction of the courts was discussed, and the cases bearing upon the question were reviewed. In the opinion, on page 186, we find this sentence, which is pertinent to the present case: "The exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character." In *Schooner Exchange v. M'Faddon*, 7 Cranch, 116, Chief Justice Marshall gives a very clearly reasoned statement of the principles which control the courts in their decisions that they have no jurisdiction over a sovereign of a foreign State who comes within their precincts. The decision was that the courts of the United States had no jurisdiction over a public armed vessel in the service of a sovereign of another country at peace with the United States. At page 137 we find this statement of a reason for the law that governs such cases: "One sovereign being in no respect amen-

able to another; and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."

The doctrine that the courts have no jurisdiction to proceed with a suit against the sovereign of another State is established in England in numerous decisions. It applies to all proceedings against the public property of such a sovereign. It was clearly laid down and applied in the cases of *Wadsworth v. Queen of Spain*, 17 Q. B. 171, and *DeHaber v. Queen of Portugal*, 17 Q. B. 171, 196. It was again applied in *The Constitution*, L. R. 4 P. D. 39, and also in *The Parlement Belge*, L. R. 5 P. D. 197, where an elaborate review of the decisions is given by Brett, L. J., who says on page 214: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

In *Vavasseur v. Krupp*, 9 Ch. D. 351, 361, Lord Justice Cotton sums up the law as follows: "This court has no jurisdiction, and in my opinion none of the courts in this country have any jurisdiction, to interfere with the property of a foreign sovereign, more especially what we call the public property of the State of which he is sovereign as distinguished from that which may be his own private property. The courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented, as all foreign countries having a sovereign are represented, by the individual who is the sovereign." In *Young v. The Scotia*, [1903] A. C. 501, there is an

elaborate discussion of the exemption of public property from process of the courts of its own sovereignty. The doctrine was applied to a claim for salvage of a public vessel which was used by the Canadian government as a ferry boat, in connection with a line of railway and as a part of the general means of transportation, just as cars are used on the Intercolonial Railway. See also the very recent case of *The Jassy*, 75 L. J. P. D. & A. 93, where the principle suggested for our guidance was applied to a vessel which was the property of the King of Roumania.

The principles which have long been recognized as applicable to the dealings of all nations with one another, as well as the formal decisions of the courts, make it plain that this action must be dismissed for want of jurisdiction. The plaintiff must seek her remedy in the courts of the country in which she received her injury, where there is a statutory provision for such cases.

Action dismissed.

THE PORTO ALEXANDRE.

COURT OF APPEAL OF ENGLAND. 1919
Law Reports [1920] P. 30.

Appeal from a decision of Hill J. setting aside the writ *in rem* and all subsequent proceedings against the steamship *Porto Alexandre*. . . .

SCRUTTON L. J. In this case the *Porto Alexandre* came into the Mersey, got on to the mud, and was salvaged by three Liverpool tugs. On arresting her to obtain security for the payment of their salvage, the Portuguese Republic, through the Portuguese Chargé d'Affaires, put forward a statement that she was a public vessel of the Portuguese Republic, and was therefore exempt from any process in England. Accordingly the defendants moved to set aside the writ and arrest. Hill J. in the Admiralty Court granted the application and the plaintiffs' appeal to this Court.

Now this state and other states proceed in their jurisprudence on the assumption that sovereign states are equal and independent, and that as a matter of international courtesy no one sovereign independent state will exercise any jurisdiction over the person of the sovereign or the property of any other

sovereign state; and now that sovereigns move about more freely than they used to, and do things which they used not to do, and now that states do things which they used not to do, the question arises whether there are any limits to the immunity which international courtesy gives as between sovereign independent states and their sovereigns. I think it has been well settled first of all as to the sovereign that there are no limits to the immunity which he enjoys. His private character is equally free as his public character. If he chooses to come into this country under an assumed name and indulge in privileges not peculiar to sovereigns, of making promises of marriage and breaking them, the English Courts still say on his appearing in his true character of sovereign and claiming his immunity, that he is absolutely free from the jurisdiction of this Court. That is the well-known case of *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149. It has been held, as Mr. Dunlop admits, in *The Parlement Belge*, 5 P. D. 197, that trading on the part of a sovereign does not subject him to any liability to the jurisdiction. His ambassador is in the same position; an ambassador coming here as an ambassador of the sovereign may engage in private trading, but it has been held that his immunity still protects him even from proceedings in respect of his private trading. Jervis C. J. in *Taylor v. Best* (1854), 14 C. B. 487, 519, said: “. . . if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in the 7 Anne, c. 12, s. 5, in the case of an ambassador's servant. If an ambassador or public minister, during his residence in this country, violates the character in which he is accredited to our Court, by engaging in commercial transactions, that may raise a question between the Government of this country and that of the country by which he is sent; but he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character,—the proviso in the statute of Anne limiting the privilege in cases of trading applying only to the servants of the embassy.” There being no limitation in the case of the sovereign, and no limitation in the case of the ambassador, is there any limitation in the case of the property? Mr. Dunlop has argued before us that in the case of property of the state there is a limitation, and that—as I understand him—if the property is used in trading that cannot be for the public service of the state. That is not the way

in which he expressed it, but it appears to me to be the proposition which emerges from his argument.

We are concluded in this Court by the decision in *The Parlement Belge*, 5 P. D. 197, 217. Sir Robert Phillimore took the view that trading with the property of a state might render that property liable to seizure; but the Court of Appeal in *The Parlement Belge* overruled the views of Sir Robert Phillimore, as I understand them. The principle then laid down has been recited by the other members of the Court. Brett L. J. said: "As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its Courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use." One of the reasons given seems to me conclusive: the moment property is arrested in the Admiralty Court a proceeding is instituted against the person, and the person is compelled to appear if he wants to protect his property, and by seizing his property the personal rights of the sovereign or the personal rights of the state are interfered with. The position seems to me to be very accurately stated in the 7th edition of Hall's *International Law* at p. 211, where, after dealing with warships and public vessels so called, Mr. Hall goes on to deal with other vessels employed in the public service and property possessed by the state within foreign jurisdiction, and says: "If in a question with respect to property coming before the Courts a foreign state shows the property to be its own, and claims delivery, jurisdiction at once fails, except in so far as it may be needed for the protection of the foreign state."

I quite appreciate the difficulty and doubt which Hill J. felt in this case, because no one can shut his eyes, now that the fashion of nationalisation is in the air, to the fact that many states are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult; but it seems to me the remedy is not in these Courts. *The Parlement Belge*, 5 P. D. 197, 217, excludes remedies in these Courts. But there are practical commercial remedies. If ships of the state find themselves left on the mud because no one will save them when the State refuses any legal remedy for salvage, their

owners will be apt to change their views. If the owners of cargoes on national ships find that the ship runs away and leaves them to bear all the expenses of salvage, as has been done in this case, there may be found a difficulty in getting cargoes for national ships. These are matters to be dealt with by negotiations between Governments, and not by Governments exercising their power to interfere with the property of other states contrary to the principles of international courtesy which govern the relations between independent and sovereign states. While appreciating the difficulties which Hill J. has felt, I think it is clear that we must, in this Court, stand by the decision already given, and the appeal must be dismissed.

[BANKES L. J. and WARRINGTON L. J. delivered concurring opinions.]

OWNERS OF S. S. VICTORIA v. OWNERS OF S. S.
QUILLWARK.

COURT OF SESSION OF SCOTLAND. 1921.
1922, 1 Scots Law Times, 65.

[The pursuer sues for damages amounting to £15,000 because of loss due to a collision in the Panama Canal for which the Quillwark, a vessel belonging to the United States Shipping Board, was responsible. Six months later, when the Quillwark was in the Clyde, the pursuers refrained from arresting it because of a stipulation entered into by the defender whereby it was agreed in consideration of such refraining to pay any claim against the Quillwark which might be established. But the defender expressly reserved the right to object to the jurisdiction of the court on the ground of the public ownership of the vessel. When suit was brought the defender entered a plea to the jurisdiction. Only so much of the opinion is given as pertains to this plea.]

LORD HUNTER. . . . In reply to the defenders' averments the pursuers say, "It is believed and averred that the 'Quillwark' was at the time of the collision aftermentioned chartered as a merchant vessel. In any event, she was being employed as

a merchant ship for the purposes of commerce and not in the public service of the United States. The pursuers believe and aver that the 'Quillwark' was officered and manned by officers and men belonging to the United States Mercantile Marine, and not to the United States Navy, and that she was entered and cleared with the Customs as a merchant vessel."

The second branch of the pursuers' second plea is that on account of the uses for which the "Quillwark" was employed the plea to jurisdiction ought to be repelled.

It is in accordance with the recognised doctrine of international law that the Sovereign or Sovereign Power of any civilized State is not subject to the civil jurisdiction of any other State and that the property owned by such Sovereign or Sovereign power is not liable to be arrested if found within the territory of another State. It might be thought that the generality of this doctrine of immunity might admit of an exception where the foreign State engages in trade and the question arises with reference to the subject matter of that trade. The inconvenience of granting immunity in the case of a State owning ships employed in ordinary trading as opposed to State business has been recognised by English judges. That circumstance, however, has not prevented the Courts in England from giving effect to the doctrine. In the "Porto Alexandre" ([1920] P. 30) it is expressly decided that a vessel owned or requisitioned by a Sovereign independent State and earning freight for the State, is not deprived of the privilege, decreed by international comity, of immunity from the process of arrest by reason of the fact that she is being employed in ordinary trading voyages carrying cargoes for private individuals. No case decided in Scotland was referred to, but it was not argued for the pursuers that so far as I am concerned I should do other than follow this decision as containing a statement of law equally applicable to England or Scotland. It appears to me therefore that the pursuers' averments as to the employment of the "Quillwark" would not, if established, justify me in holding that that vessel was liable to arrestment. . . .

I shall therefore sustain their first plea in law and dismiss the action.

NOTE.—The opinion of Chief Justice Marshall in *The Schooner Exchange v. McFaddon* (1812), 7 Cranch, 116, is so thorough a treatment of the principles upon which the immunity of public vessels is based as to give rise to the impression that the immunity was estab-

lished by that decision. The principle however had long been recognized. In 1637 in the case of *The Victory*, Maraden, *Law and Custom of the Sea*, I, 496, it was asserted by counsel:

By the laws of nations and the seas . . . and by the right and power of the imperial crowne of England his Majesty, and his noble progenitors, Kings of England for times immemoriall, have had the said preminory and freedom acknowledged and yielded in all ports and havens of princes, their allies, that their royall ships . . . have bin held free, and so acknowledged, from any such arresting, entry, visitation, and search, in as full manner as if they had bin within the ports and havens of their owne dominions.

In order for a vessel to be entitled to the immunity of a public ship it is not necessary that it should be publicly owned. It is sufficient if it is in the service of the state and is controlled by the state, *The Broadmayne* (1916), L. R. [1916], P. 64; *The Eolo* (1917), L. R. [1918] 2 I. R. 78; *The Messicanó* (1916), 32 T. L. R. 519.

The immunity of public property from the jurisdiction of another state was based upon the assumption that the property in question was a part of the machinery of government and that any exercise of control over it would necessarily involve interference with the operation of the government to which it belonged. Furthermore if it were made subject to suit, its owner would be compelled to appear in defense and submit to the jurisdiction of the court, and thus the personal immunity of the sovereign himself would be impaired. As was said in *Stanley v. Schwalby* (1893), 147 U. S. 508, 512, "There is no distinction between suits against the government directly and suits against its property". Hence unless the public functions of states are to be subject to some degree of control on the part of other states and the immunity of the sovereign is to be impaired, public property, at least while used for a public purpose, must be exempt from the jurisdiction of other countries.

Public property employed in private commerce is sometimes held to lose its immunity in accordance with the principle stated by Chief Justice Marshall in *United States v. Planters' Bank* (1824), 9 Wheaton, 904, 907, where he said that "when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character." As an incident to this principle it has been held that if a foreign sovereign appears as a plaintiff in a commercial transaction, he may be required to find security for costs, *Emperor of Brazil v. Robinson* (1837), 5 Dowl. 522. When the State of South Carolina established a series of public dispensaries for the sale of liquor and forbade its sale through any other channels, it claimed that the dispensaries were institutions of government and hence exempt from Federal taxation. This claim was denied in *South Carolina v. United States* (1905), 199 U. S. 437. But as to some forms of public property employed in private business, particularly ships, many countries still insist that

their status in foreign jurisdictions shall be determined by their ownership rather than by the nature of their employment. And this seems to be the rule of international law.

The immunity of all public property from the jurisdiction of other states was based upon a condition which no longer exists. When the immunity was established the property affected was devoted to distinctly public uses, but in the course of the Great War the range of governmental activity was so much enlarged, particularly in the field of shipping, that the considerations which led to the establishment of the rule exempting all public property from the jurisdiction of other states no longer apply. Courts, however, may well hesitate to alter the rule. As was pointed out in *The Maipo* (1918), 252 Fed. 627, 631, it may be that a government assumes control over its shipping for the very purpose of availing itself of the exemption to which public property has always been entitled, and thus avoid the delays to which its ships might otherwise be liable.

The extent to which the immunity of publicly owned ships engaged in private business will be recognized varies in different countries. In England and Scotland it is recognized to the fullest extent. In the United States the Supreme Court has not yet passed upon the question, but among the lower courts the weight of authority is in favor of such immunity. See *The Roseric* (1918), 254 Fed. 154; *contra*, *The Attualita* (1916), 238 Fed. 909; *The Pesaro* (1921), 277 Fed. 473. In Germany, in the case of *The Ice King*, February 23, 1921, a vessel belonging to the United States Shipping Board which had been arrested for damage caused by collision, the Court of Appeal (*Hanseatic Oberlandesgericht*) of Hamburg held that the arrest of such vessel was invalid even though the vessel was employed in ordinary commercial business. In the course of its opinion the court said:

Now this plaintiff has pointed out, and properly, that the need of differentiating internationally between public ships serving public purposes and public ships serving private purposes like ordinary trading vessels has only just been called forth by developments during the war, and therefore played no part in the formation of international law up to that time. It is indeed worthy of consideration whether the action of the Government of the United States in the enactment of the Shipping Act, by which a very large number of trading vessels have been declared to be public property and hence removed from the jurisdiction of foreign states, would not, because of its bearing on international private trade so affect that rule of international law (which after all is rooted in the *comitas gentium*) and the reasons for it as to make necessary a new international regulation. Such an alteration of the law, accomplished by the making of treaties or the enactment of legislation, it is not permitted to this court to anticipate.

The court ordered the release of the vessel, and the decision was affirmed by the German Supreme Court December 10, 1921.

In *The Porto Alexandre* (1919), L. R. [1920] P. 30, 34, Lord Justice Bankes had faced the same difficulty and had expressed the opinion that the remedy is not to be found in the courts. In Italy and Belgium the distinction between public and private acts of the state is fully recognized. In Italy a publicly owned vessel employed in private business is subject to arrest. In Belgium such a vessel is not subject to arrest, but a claim against it may be prosecuted to judgment.

For other examples of the exemption of public property from judicial process in a foreign state, see *The Constitution* (1879) L. R. 4 P. D. 39, in which the court refused to order the arrest of a war vessel in order to compel payment for salvage services; *Briggs v. The Lightboats* (1865), 11 Allen (Mass.), 157, in which the court declined to enforce a builder's lien on lightboats constructed for the United States; *Vavasseur v. Krupp* (1878), L. R. 9 Ch. Div. 351, in which the court refused to enjoin delivery to the Government of Japan of certain shells manufactured for it in Germany and brought to England for shipment to Japan. The court said:

Even if the Mikado had brought himself into court as an ordinary defendant, that, in my opinion, would not give the court jurisdiction as against the subject matter, namely jurisdiction to interfere with the public property of Japan which is represented here by the Mikado.

That the exemption is strictly confined to the ships of a sovereign power is shown by *The Charkieh* (1873), L. R. 4 Adm. & Ecc. 59, where it was denied to a ship belonging to the Khedive of Egypt, who was a subject of the Sultan of Turkey. Public ships are however subject to the local police regulations, *Moore, Digest*, II, 583. A court may adopt suitable means to ascertain whether a vessel purporting to be a public vessel is what she claims to be, *Talbot v. Jansen* (1795), 3 Dallas, 133. As to what is a public ship, see *Tucker v. Alexandroff* (1901), 183 U. S. 424. As to the status of a military force permitted to march through the country, see *Coleman v. Tennessee* (1879), 97 U. S. 509, 515. Prisoners on a ship of war are not subjected to the local jurisdiction when a ship puts into a neutral port, *L'Invincible* (1816), 1 Wheaton, 238, 252. As to asylum on war ships, see *Int. Law Situations*, 1902, 21; *Moore's Digest*, II, 845.

Although the property belonging to a state or requisitioned for its use is not subject to arrest so long as it is, in the possession of the state, a lien may be enforced against such property in the United States if it is not in public possession, for in such circumstances there is no disturbance of possession, *The Davis* (1869), 10 Wallace, 15, *Johnson Lighterage Co. no. 24* (1916), 231 Fed. 365; *The Beaverton* (1919), 273 Fed. 539. If a ship or other property is requisitioned for the public service and is in public possession, it may not be detained, *The Broadmayne* (1916), L. R. [1916] P. 64, but if the complainant's right against the vessel arose prior to requisition, he may be permitted, under some circumstances, to pursue it to judgment, en-

forcement of the judgment being deferred until the property in question has passed into private possession, *The Messicano* (1916), 32 T. L. R. 519; but in the case of property which is owned by the state, Mr. Justice Holmes said in *The Western Maid* (1922), 257 U. S. 419, that since "property in public possession cannot be seized to the disturbance of that possession, no right arises which can be enforced against that property when it passes from public to private possession." The same principle was followed by the English Court of Appeal in *The Tervaste* (1922), 38 T. L. R. 825.

For further discussion of the immunity of public property, see Walton, "State Immunity in the Laws of England, France, Italy and Belgium," *Journal of the Society of Comparative Legislation and International Law*, (Series III), II, 252; Cobbett, *Cases and Opinions*, I, 261; Bonfils (Fauchille), sec. 643; Hyde, I, 435; Moore, *Digest*, II, 562.

SECTION 4. EXTERRITORIALITY.

PAPAYANNI AND OTHERS, Appellants v. THE RUSSIAN STEAM NAVIGATION AND TRADING CO., Respondents.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1863.
2 Moore, Privy Council (N. S.), 161

On an appeal from Her Majesty's Supreme Consular Court, Constantinople.

[The steamer *Laconia*, belonging to the appellants, a British corporation, collided in the Sea of Marmora with the *Colchide*, the property of the respondents, a Russian corporation. As a result the *Colchide* was lost. Her owners then instituted proceedings against the owners of the *Laconia* before the British Supreme Consular Court at Constantinople, and by permission of the Russian Government submitted themselves to its jurisdiction. From the decision of that tribunal the present appeal was taken, chiefly on the ground that a British consular court in Turkey had jurisdiction only over suits between British subjects. It appeared in evidence that the corporation styled "The Governor and Company of Merchants of England trading to the Levant Seas," chartered by James I in 1606, had been authorized by Charles II in 1662 to institute consular courts in the Ottoman Dominions for the government of transactions between British merchants therein. These privileges, which were long

exercised by the tacit consent of the Ottoman Government, were expressly confirmed by treaty in 1809.]

Their Lordships' judgment was pronounced by DR. LUSHINGTON.

In considering what power and what jurisdiction was conceded to Great Britain within certain portions of the Turkish dominions, it must always be borne in mind that in almost all transactions, whether political or mercantile, a wide difference subsists in the dealings between an Oriental and a Christian State and the intercourse between two Christian nations.

This is an undoubted fact. Many of the reasons are obvious, but this is not the occasion for discussing them. It is sufficient for us to know and acknowledge that such is the fact.

It is true beyond all doubt that, as a matter of right, no State can claim jurisdiction of any kind within the territorial limits of another independent State.

It is also true that between two Christian States all claims for jurisdiction of any kind, or exemption from jurisdiction, must be founded on Treaty, or engagements of similar validity. Such, indeed, were Factory establishments for the benefit of trade.

But though, according to the laws and usages of European nations, a cession of jurisdiction to the subjects of one State within the territory of another, would require, generally at least, the sanction of a Treaty, it may by no means follow that the same strict forms, the same precision of Treaty obligation, would be required or found in intercourse with the Ottoman Porte. . . .

Any mode of proof by which it is shown that a privilege is conceded is, according to the principles of natural justice, sufficient for the purpose. The formality of a Treaty is the best proof of the consent and acquiescence of parties, but it is not the only proof, nor does it exclude other proof; and more especially in transactions with Oriental States.

Consent may be expressed in various ways; by constant usage permitted and acquiesced in by the authorities of the State, active assent, or silent acquiescence, where there must be full knowledge. . . .

We think, looking at the whole of this case, that so far as the Ottoman Government is concerned, it is sufficiently shown that they have acquiesced in allowing to the British Government a

jurisdiction, whatsoever be its peculiar kind, between British subjects and the subjects of other Christian States.

It appears to us that the course was this: that at first, from the total difference of religious habits and feelings, it was necessary to withdraw as far as practicable British subjects from the native Courts; then in the progress of time commerce increasing, and various nations having the same interest in abstaining from resort to the Tribunals of Mussulmans, &c., recourse was had to Consular Courts; and by degrees the system became general.

Of all this the Government of the Ottoman Porte must have been cognizant, and their long acquiescence proves consent. . . .

Though the Ottoman Porte could give and has given to the Christian Powers of Europe authority to administer justice to their own subjects according to their own laws, it neither has professed to give nor could give to one such Power any jurisdiction over the subjects of another Power. But it has left those Powers at liberty to deal with each other as they may think fit, and if the subjects of one country desire to resort to the Tribunals of another, there can be no objection to their doing so with the consent of their own Sovereign and that of the Sovereign to whose Tribunals they resort. . . .

The general right of the Consular Court to entertain the suit under these circumstances is perfectly clear, and to throw any doubt upon it would be to subvert all the principles upon which justice is administered amongst the subjects of Christian Powers in this and other countries of the East.

IN RE ROSS, PETITIONER.

SUPREME COURT OF THE UNITED STATES. 1891.
140 U. S. 453.

Appeal from the Circuit Court of the United States for the Northern District of New York. . . .

[The petitioner, a native of Prince Edward Island and a British subject, was a member of the crew of the American merchant ship Bullion. In 1880, the ship being then in the harbor of Yokohama, Japan, the petitioner, while on the ship, assaulted and

killed the second mate. He was arrested by direction of the master of the vessel and confined in jail at Yokohama. The next day a complaint charging him with murder was filed by the master of the vessel with the American Consul General at Yokohama. The accused denied the jurisdiction of the Consular Court on the ground that he was not an American citizen and that he had not been indicted or presented by a grand jury as required by the Constitution of the United States. These objections were overruled. The Consular Court then proceeded to trial, found the accused guilty and sentenced him to death. This sentence was approved by the American Minister to Japan, but a pardon was granted by President Hayes "on condition that the said John M. Ross be imprisoned at hard labor for the term of his natural life in the Albany penitentiary, in the State of New York." Pardon was accepted by the accused on the terms stated. Nearly ten years later, he applied to the United States Circuit Court for a writ of *habeas corpus* for his discharge, alleging that his conviction, sentence and imprisonment were unlawful because of the Consular Court's lack of jurisdiction. The Circuit Court denied his petition, 44 Fed. 185, and he appealed.]

MR. JUSTICE FIELD . . . delivered the opinion of the court.

The Circuit Court did not refuse to discharge the petitioner upon any independent conclusion as to the validity of the legislation of Congress establishing the consular tribunal in Japan, and the trial of Americans for offences committed within the territory of that country, without the indictment of a grand jury, and without a trial by a petit jury, but placed its decision upon the long and uniform acquiescence by the executive, administrative, and legislative departments of the government in the validity of the legislation. Nor did the Circuit Court consider whether the status of the petitioner as a citizen of the United States, or as an American within the meaning of the treaty with Japan, could be questioned, while he was a seaman of an American ship, under the protection of the American flag, but simply stated the view taken on that subject by the Minister to Japan, the State Department, and the President. Said the court: "During the thirty years since the statutes conferring the judicial powers on ministers and consuls, which have been referred to, were enacted, that jurisdiction has been freely exercised. Citizens of the United States have been tried for seri-

ous offences before these officers, without preliminary indictment or a common-law jury, and convicted and punished. These trials have been authorized by the regulations, orders, and decrees of ministers, and it must be presumed that the regulations, orders, and decrees of ministers prescribing the mode of trial have been transmitted to the Secretary of the State, and by him been laid before Congress for revision, as required by law. Unless the petitioner was not properly subject to this jurisdiction because he was not a citizen of the United States, his trial and sentence were in all respects modal, as well as substantial, regular and valid under the laws of Congress, according to the construction placed upon these statutes by the acquiescence of the executive, administrative, and legislative departments of the government for this long period of time."

Under these circumstances the Circuit Court was of opinion that it ought not to adjudge that the sentence imposed upon the petitioner was utterly unwarranted and void, when the case was one in which his rights could be adequately protected by this court, and when a decision by the Circuit Court setting him at liberty, although it might be reversed, would be practically irrevocable.

The Circuit Court might have found an additional ground for not calling in question the legislation of Congress, in the uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries, or to invest their consuls with judicial authority, which is the same thing, for the trial of their own subjects or citizens for offences committed in those countries, as well as for the settlement of civil disputes between them; and in the uniform recognition, down to the time of the formation of our government, of the fact that the establishment of such tribunals was among the most important subjects for treaty stipulations. This recognition of their importance has continued ever since, though the powers of those tribunals are now more carefully defined than formerly. *Dainese v. Hale*, 91 U. S. 13.

The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the Middle Ages. During those ages these commercial magistrates, generally desig-

nated as consuls, possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offences. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offence, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people.

The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.

We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out, contending that, so far as crimes of a felonious character are concerned, the same protection and guarantee against an undue accusation or an unfair trial, secured by the Constitution to citizens of the United States at home, should be enjoyed by them abroad. In none of the laws which have been passed by Congress to give effect to treaties of the kind has there been any attempt to require indictment by a grand jury before one can be called upon to answer for a public offence of that grade committed in those countries, or to secure a jury on the trial of the offence. Yet the laws on that subject have been passed without objection to their

constitutionality. Indeed, objection on that ground was never raised in any quarter, so far as we are informed, until a recent period.

It is now, however, earnestly pressed by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook v. United States*, 138 U. S. 157, 181. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree upon, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of

the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture. Letter of Mr. Cushing to Mr. Calhoun of Sept. 29, 1844, accompanying President's message communicating abstract of treaty with China, Senate Doc. 58, 28th Cong. 2d Sess.; Letter on Judicial Extraterritorial Rights by Secretary Frelinghuysen to Chairman of Senate Committee on Foreign Relations of April 29, 1882, Senate Doc. 89, 47th Cong. 1st Sess.; Phillimore on Int. Law, vol. 2, part 7; Halleck on Int. Law, c. 41.

We turn now to the treaties between Japan and the United States.

The treaty of June 17, 1857, executed by the consul general of the United States and the governors of Simoda, is the one which first conceded to the American consul in Japan authority to try Americans committing offences in that country. Article IV. of that treaty is as follows:

"ART. IV. Americans committing offences in Japan shall be tried by the American consul general or consul, and shall be punished according to American laws. Japanese committing offences against Americans shall be tried by the Japanese authorities and punished according to Japanese laws." 11 Stat. 723. . . .

Our government has always treated Article IV. of the treaty of 1857 as continuing in force, and it is published as such in the United States Consular Regulations, issued in 1888. Appendix No. 1, p. 313. Its official interpretation is found in Article 71 of those regulations, which declares that "consuls have exclusive jurisdiction over crimes and offences committed by citizens of the United States in Japan." Mr. Bingham, our minister to that country for several years after the treaty of 1858, always assumed the incorporation into that treaty of all the provisions of the treaty of 1857, or that they were saved by it. When the prisoner reached San Francisco, on his way from Japan to Albany, he applied to the Circuit Court of the United States for a writ of *habeas corpus*, and cited the sixth article of the treaty of 1858, insisting that it only provided for the trial of Americans by American Consular Courts in Japan for offences committed against Japanese, and therefore he could not be held to answer for the murder of the second officer of the American ship Bullion, when in Japanese

waters, because he was not a Japanese subject. In a communication made under date of June 8, 1881, by the minister to the Secretary of State, reference is made to this position, and the following language is used: "Nothing, in my opinion, could more strongly testify to the utter weakness of the claim made for Ross against the government than this attempt to limit the jurisdiction of our consuls in Japan over Americans, guilty of crimes by them committed within this empire, to such crimes only as they should commit upon the persons of Japanese subjects. According to this logic, Americans may in Japan murder each other and the citizens or subjects of all lands save the subjects of Japan with impunity—as it is admitted by this government that it cannot try an American for any offence whatever—and it must also be conceded that the tribunals of no other government than our own can try Americans for crimes by them committed within this empire. In giving my reasons to the department for sustaining the jurisdiction of the United States in this case, and for approving as I did the conviction of Ross, in which the consul general and the four associations who sat with him had concurred, I cited Article IV. of our convention of 1857 with Japan, to wit: 'That Americans committing offences in Japan shall be tried by the American consul general or consul, and shall be punished according to American law.' This provision of the convention of 1857 and all other provisions thereof were saved and incorporated in our treaty of 1858 with Japan, Article XII. [quoted above]. You will observe that Mr. Townsend Harris was the consul general of the United States who negotiated both of these treaties with Japan, and that the treaty of 1858 was ratified April 12, 1860, and that thereafter, to wit, June 22, 1860, Congress passed the act to carry into effect this treaty with Japan, and provided that the minister and consuls of the United States in Japan be 'fully empowered to arraign and try in the manner (in said statute provided) all citizens of the United States charged with offences against law committed' (by them in Japan); [sec. 4084, Rev. Stat.]; and also by section 4086 provided that the jurisdiction in both civil and criminal matters in Japan shall 'in all cases be exercised and enforced in conformity with the laws of the United States, which so far as necessary to execute such treaty are extended over all citizens of the United States therein, and over all others to the extent the terms of the treaty justify or require.' Here was the construction above stated by me asserted

by the same Senate which ratified the treaty, and by the same President who approved both the treaty and the act of Congress. The President and the department have always construed the treaty of 1858 as carrying with it and incorporating therein the fourth article and all other provisions of the convention of 1857."

The legislation of Congress to carry into effect the treaty with Japan is found in the Revised Statutes, in sections most of which apply equally to treaties with China, Siam, Egypt and Madagascar (secs. 4083-4091). Confining ourselves to the treaty with Japan only, we find that the legislation secures a regular and fair trial to Americans committing offences within that empire.

It enacts that the minister and consuls of the United States, appointed to reside there, shall, in addition to other powers and duties imposed upon them respectively, be invested with the judicial authority therein described, which shall appertain to their respective offices and be a part of the duties belonging thereto, so far as the same is allowed by treaty; and empowers them to arraign and try, in the manner therein provided, all citizens of the United States charged with offences against law committed in that country, and to sentence such offenders as therein provided, and to issue all suitable and necessary process to carry their authority into execution. It declares that their jurisdiction in both criminal and civil matters shall in all cases be exercised and enforced in conformity with the laws of the United States, which, so far as necessary to execute the treaty and suitable to carry it into effect, are extended over all citizens of the United States in Japan, and over all others there to the extent that the terms of the treaty justify or require. It also provides that where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others; and that if neither the common law, nor the law of equity, or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the minister shall, by decrees and regulations, which shall have the force of law, supply such defects and deficiencies. Each of the consuls is authorized, upon facts within his own knowledge, or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed

by the minister, to issue his warrant for the arrest of any citizen of the United States charged with committing in the country an offence against law; and to arraign and try such offender; and to sentence him to punishment in the manner therein prescribed.

The legislation also declares that insurrection or rebellion against the government, with intent to subvert the same, and murder, shall be punishable with death, but that no person shall be convicted thereof unless the consul and his associates in the trial all concur in the opinion, and the minister approves of the conviction. It also provides that whenever in any case the consul is of opinion that, by reason of the legal questions which may arise therein, assistance will be useful to him, or that a severer punishment than previously specified in certain cases will be required, he shall summon to sit with him on the trial one or more citizens of the United States, not exceeding four, and in capital cases not less than four, who shall be taken by lot from a list which has been previously submitted to and approved by the minister, and shall be persons of good repute and competent for the duty.

The jurisdiction of the consular tribunal, as is thus seen, is to be exercised and enforced in accordance with the laws of the United States; and of course in pursuance of them the accused will have an opportunity of examining the complaint against him, or will be presented with a copy stating the offence he has committed, will be entitled to be confronted with the witnesses against him and to cross-examine them, and to have the benefit of counsel; and, indeed, will have the benefit of all the provisions necessary to secure a fair trial before the consul and his associates. The only complaint of this legislation made by counsel is that, in directing the trial to be had before the consul and associates summoned to sit with him, it does not require a previous presentment or indictment by a grand jury, and does not give to the accused a petit jury. The want of such clauses, as affecting the validity of the legislation, we have already considered. It is not pretended that the prisoner did not have, in other respects, a fair trial in the Consular Court.

It is further objected to the proceedings in the Consular Court that the offence with which the petitioner was charged, having been committed on board of a vessel of the United States in Japanese waters, was not triable before the Consular Court; and that the petitioner, being a subject of Great Britain, was

not within the jurisdiction of that court. These objections we will now proceed to consider.

The argument presented in support of the first of these positions is briefly this. Congress has provided for the punishment of murder committed upon the high seas, or any arm or bay of the sea within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State; and has provided that the trial of all offences committed upon the high seas, out of the jurisdiction of any particular State, shall be in the district where the offender is found or into which he is first brought. The term "high seas" includes waters on the sea coast without the boundaries of low-water mark; and the waters of the port of Yokohama constitute, within the meaning of the statute, high seas. Therefore it is contended that, although the ship *Bullion* was at the time lying in those waters, the offence for which the appellant was tried and convicted was committed on the high seas and within the jurisdiction of the domestic tribunals of the United States, and is not punishable elsewhere. In support of this position it is assumed that the jurisdiction of the Consular Court is limited to offences committed on land, within the territory of Japan, to the exclusion of offences committed on waters within that territory.

There is, as it seems to us, an obvious answer to this argument. The jurisdiction to try offences committed on the high seas in the district where the offender may be found, or into which he may be first brought, is not exclusive of the jurisdiction of the consular tribunal to try a similar offence when committed in a port of a foreign country in which that tribunal is established, and the offender is not taken to the United States. There is no law of Congress compelling the master of a vessel to carry or transport him to any home port when he can be turned over to a consular court having jurisdiction of similar offences committed in the foreign country. 7 *Opinions Attys-Gen.* 722. The provisions conferring jurisdiction in capital cases upon the consuls in Japan, when the offence is committed in that country, are embodied in the Revised Statutes, with the provisions as to the jurisdiction of domestic tribunals over such offences committed on the high seas; and those statutes were re-enacted together, and, as re-enacted, went into operation at the same time. To both effect must be given in proper cases, where they are applicable. We do not adopt the limitation stated by counsel

to the jurisdiction of the consular tribunal, that it extends only to offences committed on land. Neither the treaty nor the Revised Statutes to carry them into effect contain any such limitation. The latter speak of offences committed in the country of Japan—meaning within the territorial jurisdiction of that country—which includes its ports and navigable waters as well as its lands.

The position that the petitioner, being a subject of Great Britain, was not within the jurisdiction of the Consular Court, is more plausible, but admits, we think, of a sufficient answer. The national character of the petitioner, for all the purposes of the consular jurisdiction, was determinable by his enlistment as one of the crew of the American ship *Bullion*. By such enlistment he becomes an American seaman—one of an American crew on board of an American vessel—and as such entitled to the protection and benefits of all the laws passed by Congress on behalf of American seamen, and subject to all their obligations and liabilities. Although his relations to the British Government are not so changed that, after the expiration of his enlistment on board of the American ship, that government may not enforce his obligation of allegiance, and he on the other hand may not be entitled to invoke its protection as a British subject, that relation was changed during his service of seaman on board of the American ship under his enlistment. He could then insist upon treatment as an American seaman, and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born. He owes for that time to the country to which the ship on which he is serving belongs, a temporary allegiance; and must be held to all its responsibilities. The question has been treated more as a political one for diplomatic adjustment, than as a legal one to be determined by the judicial tribunals, and has been the subject of correspondence between our government and that of Great Britain.

The position taken by our government is expressed in a communication from the Secretary of State, to the British government, under date of June 16, 1881. It was the assertion of a principle which the Secretary insisted "as in entire conformity with the principles of English law as applied to a mercantile service almost identical with our own in its organization and regulation. That principle is that, when a foreigner enters the mercantile marine of any nation and becomes one of the crew

of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation in the exercise of an unquestioned authority governs its vessels and seamen. If, therefore," he continued, "the government of the United States has by treaty stipulation with Japan acquired the privilege of administering its own laws upon its own vessels and in relation to its own seamen in Japanese territory, then every American vessel and every seaman of its crew are subject to the jurisdiction which by such treaty has been transferred to the government of the United States."

"If Ross had been a passenger on board of the Bullion, or if, residing in Yokohama, he had come on board temporarily and had then committed the murder, the question of jurisdiction would have been very different. But, as it was, he was part of the crew, a duly enrolled seaman under American laws, enjoying the protection of this government to such an extent that he could have been protected from arrest by the British authorities; and his subjection to the laws of the United States cannot be avoided just at the moment that it suits his convenience to allege foreign citizenship. The law which he violated was the law made by the United States for the government of United States vessels; the person murdered was one of his own superior officers whom he had bound himself to respect and obey, and it is difficult to see by what authority the British government can assume the duty or claim the right to vindicate that law or protect that officer."

"The mercantile service is certainly a national service, although not quite in the sense in which that term would be applied to the national navy. It is an organized service, governed by a special and complex system of law, administered by national officers, such as collectors, harbor masters, shipping masters and consuls, appointed by national authority. This system of law attaches to the vessel and crew when they have a national port and accompanies them round the globe, regulating their lives, protecting their persons and punishing their offences. The sailor, like the soldier during his enlistment, knows no other allegiance than to the country under whose flag he serves. This law may be suspended while he is in the ports of a foreign nation, but where such foreign nation grants to the country which he serves the power to administer its own laws in such

foreign territory, then the law under which he enlisted again becomes supreme."

The Secretary concluded his communication with the following expression of the determination of our government:

"So impressed is this government with the importance and propriety of these views, that while it will receive with the most respectful consideration the expression of any different conviction which her Britannic Majesty's government may entertain, it will yet feel bound to instruct its consular and diplomatic officers in the East, that in China and Japan the judicial authority of the consuls of the United States will be considered as extending over all persons duly shipped and enrolled upon the articles of any merchant vessel of the United States, whatever be the nationality of such person. And all offences which would be justiciable by the consular courts of the United States, where the persons so offending are native born or naturalized citizens of the United States, employed in the merchant service thereof, are equally justiciable by the same consular courts in the case of seamen of foreign nationality."

The determination thus expressed was afterwards carried out by incorporating the doctrine into the permanent regulations of the department for the guide of the consuls of this country. 72d regulation.

The views thus forcibly expressed present in our judgment the true status of the prisoner while an enlisted seaman on the American vessel, and give effect to the purpose of the treaty and the legislation of Congress. The treaty uses the term "Americans" in speaking of those who may be brought within the jurisdiction of the Consular Court for offences committed in Japan. The statute designates them as "citizens of the United States," and yet extends the laws of the United States, so far as they may be necessary to execute the treaty and are suitable to carry the same into effect, not only over all citizens of the United States in Japan, but also over "*all others* to the extent that the terms of the treaty justify or require."

Reading the treaty and statute together in view of the purpose designed to be accomplished, we are satisfied that it was intended by them to bring within our laws all who are citizens, and also all who, though not strictly citizens, are by their service equally entitled to the care and protection of the government. It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that pur-

pose all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties. . . .

The views expressed by the Department of State, quoted above, are in harmony with the doctrine uniformly asserted by our government against the claim by England of a right to take its countrymen from the deck of an American merchant vessel and press them into its naval service. It is a part of our history that the assertion of this claim, and its enforcement in many instances, caused a degree of irritation among our people which no conduct of any other country has ever produced. Its enforcement was deemed a great indignity upon this country and a violation of our right of sovereignty, our vessels being considered as parts of our territory. It led to the war of 1812, and although that war closed without obtaining a relinquishment of the claim, its further assertion was not attempted. At last, in a communication by Mr. Webster, then Secretary of State, to Lord Ashburton, the special British minister to this country, on the 8th of August, 1842, the claim was repudiated, and the announcement made that it would no longer be allowed by our government and must be abandoned. The conclusion of Mr. Webster's communication bears upon the question before us. After referring to the claim of Great Britain, and demonstrating the injustice of the position and its violation of national rights, he said: "In the early disputes between the two governments, on this so long-contested topic, the distinguished person to whose hands were first intrusted the seals of this department declared, that 'the simplest rule will be, that the vessel being American shall be evidence that the seamen on board are such.' Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration now had of the whole subject at a moment when the passions are laid, and no present interest or emergency exists to bias the judgment, have convinced this government that this is not only the simplest and best, but the only rule which can be adopted and observed consistently with the rights and honor of the United States, and the security of their citizens. That rule

announces, therefore, what will hereafter be the principle maintained by their government. In every regularly documented American merchant vessel, the crew who navigate it will find their protection in the flag which is over them." Webster's Works, Vol. VI, p. 325.

This rule, that the vessel being American is evidence that the seamen on board are such, is now an established doctrine of this country; and in support of it there is with the American people no diversity of opinion and can be no division of action.

We are satisfied that the true rule of construction in the present case was adopted by the Department of State in the correspondence with the English government, and that the action of the consular tribunal in taking jurisdiction of the prisoner Ross, though an English subject, for the offence committed, was authorized. While he was an enlisted seaman on the American vessel, which floated the American flag, he was, within the meaning of the statute and the treaty, an American, under the protection and subject to the laws of the United States equally with the seaman who was native born. As an American seaman he could have demanded a trial before the Consular Court as a matter of right, and must therefore be held subject to it as a matter of obligation. . . .

It is true that the occasion for consular tribunals in Japan may hereafter be less than at present, as every year that country progresses in civilization and in the assimilation of its system of judicial procedure to that of Christian countries, as well as in the improvement of its penal statutes; but the system of consular tribunals which have a general similarity in their main provisions, is of the highest importance, and their establishment in other than Christian countries, where our people may desire to go in pursuit of commerce, will often be essential for the protection of their persons and property.

We have not considered the objection to the discharge of the prisoner on the ground that he accepted the conditional pardon of the President. If his conviction and sentence were void for want of jurisdiction in the consular tribunal, it may be doubtful whether he was estopped, by his acceptance of the pardon, from assailing their validity; but into that inquiry we need not go, for the Consular Court having had jurisdiction to try and sentence him, there can be no question as to the binding force of the acceptance.

Order affirmed.

NOTE.—The organ through which states most commonly exercise their rights of jurisdiction in other countries is the consul. The functions of this officer have had a curious development which has been much misrepresented, especially in important judicial decisions concerning his powers. Until late in the Middle Ages law was thought of as personal rather than territorial. Wherever men went, their system of law, like their citizenship or allegiance, went with them. In consequence, when European merchants established themselves in the Levant and asked the consent of the local sovereign to appoint for themselves judges who would settle their controversies according to their own laws, the arrangement seemed entirely natural to both parties. The judge thus appointed by the merchants was usually called a consul. As early as 1060 the Greek emperor at Constantinople accorded this right to the Venetian merchants. In 1199, the Emperor Alexis III by his *Bulla Aurea* gave to the Venetian consuls the extraordinary right of deciding controversies not only between Venetians but also between Venetians and his own subjects. Such arrangements were not confined to the Levant. The Crusades were followed by an enormous expansion of commerce, and the Italian merchants who established themselves along the Baltic, in the Netherlands and in London, appointed consuls who exercised both a civil and a criminal jurisdiction. When their interests required it, the merchants of other countries adopted the same system, and in the fifteenth century English consuls who acted as judges were established in Sweden, Norway, Denmark, the Netherlands and Italy. As the city state of the Middle Ages declined and the new kingdoms grew up two changes took place which revolutionized the office of consul. Law came to be looked upon as territorial rather than personal, and the consuls came to be government officials chosen by their governments and not by the merchants over whom they were to exercise jurisdiction. In consequence of the placing of law upon a territorial basis, states looked upon the presence of alien tribunals in their midst as in derogation of their dignity and an impairment of their sovereignty. Hence the consul was deprived of his judicial character in all countries except those in which there was some special reason for maintaining it. At first all the countries where such a jurisdiction was retained were Mohammedan states, and their view that the blessings of Moslem jurisprudence were not for infidels assisted the states of Europe to retain their consular jurisdiction in the lands of the Prophet. Their jurisdiction at first rested on nothing more substantial than the tacit acquiescence of the Mohammedan princes, but in the case of Turkey it was explicitly confirmed and to some extent defined in a series of treaties dating from the sixteenth century known as the Capitulations. The preponderant position of France in the Ottoman dominions led citizens of other countries to place themselves under French protection, and even as late as 1830, when the United States made a treaty with Turkey, it was provided that the privileges therein described should be exercised according to the usage observed towards other Franks.

In all countries where the principle of extraterritoriality has been applied in recent years, except only Turkey, the jurisdiction claimed

was the subject of an express grant by treaty. All such grants were made after the conception of law as territorial had been fully accepted by all members of the family of nations, and were therefore admittedly in derogation of the sovereignty of the states making the grant. Since a consul in such countries may exercise only that jurisdiction which the treaty confers, he is found in practice to have a much narrower jurisdiction than do the consuls in Turkey, many of whose powers are derived only from ancient use. In China, the United States exercises jurisdiction not only through its consuls, but at Shanghai, it has established the United States Court. For its powers and functions see *Swayne & Hoyt v. Everett* (1919), 255 Fed. 71, and *Lobingier, Extraterritorial Cases*.

In addition to the exercise of extraterritorial jurisdiction in such countries as Turkey, China and Morocco, the United States frequently extends a limited diplomatic protection over certain persons who are not American citizens and even over certain classes of natives. Foreigners who have no diplomatic or consular representative to whom they can appeal often ask for the good offices of the representatives of some western government. The necessity of providing for the protection of certain classes of natives has given rise to the protégé system. The classes protected vary in different countries. The system has been so much abused that the privilege of protection is now severely restricted and is usually confined to the translators, guards and other servants of diplomatic and consular representatives and the employees of foreign merchants. Some European governments also extend their protection to the native converts to Christianity, but the United States only stipulates in its treaties with Turkey and China that there shall be no discrimination against native Christians. See Borchard, secs. 202, 203.

Consular jurisdiction may be terminated (1) by treaty, as in the case of Japan; (2) by the leasing of the districts concerned, as in the case of Port Arthur, Wei-hai-Wei and Kiaochow in China, which were leased respectively by Russia, Great Britain and Germany; (3) by the establishment of a protectorate over the country concerned such as the French protectorate over Morocco; (4) by annexation, as in the case of the annexation of Madagascar by France and of Tripoli by Italy.

The countries in which the question of consular jurisdiction is now of most importance are Turkey, China and Persia. In 1914 Turkey gave notice of its intention to terminate the Capitulations, but the states concerned declined to acquiesce. When the United States in 1922 recognized the independence of Egypt, it expressly reserved its rights therein under the Capitulations.

While the law applied in a consular court is the law of the consul's country, it is applied to the settlement of the instant case because it has been adopted for cases of that kind by the territorial sovereign and hence becomes his law, *Imperial Japanese Government v. P. & O. Co.* (1895), L. R. [1895] A. C. 644; *Secretary of State v. Charlesworth* (1900), L. R. [1901] A. C. 373. The question of extraterritoriality is discussed from the standpoint of trade domicile in *The Eumaeus*

(1915), 1 Br. & Col. P. C. 605. A foreign consul may not set up a court in the United States without express authority from the American Government so to do, *Glass v. The Betsey* (1794), 3 Dallas, 6. Other important cases dealing with the general subject are *The Indian Chief* (1880), 3 C. Robinson, 12; *Dainese v. Hale* (1875), 91 U. S. 13. The provisions in the treaties made by the United States are collected in Moore, *Extradition*, I, 100, n. 5. See also Angell, "The Turkish Capitulations," *Annual Report of the American Historical Association for 1900*, I, 513; Nys, "La Jurisdiction Consulaire," *Revue de Droit International*, 2nd series, VII, 237; Rey, *La Protection Diplomatique et Consulaire dans les Echelles de Levant et de Barbarie*; Willoughby, *Foreign Rights and Interests in China*; Tyau, *The Legal Obligations Arising out of Treaty Relations between China and Other States*, and "Exterritoriality in China and the Question of its Abolition," *British Year Book of International Law*, 1921-22, 133; MacMurray, *Treaties and Agreements with and concerning China, 1894-1919*; J. C. Bancroft Davis' notes to *Treaties and Conventions between the United States and Other Powers, 1776-1887*; Borchard, sec. 180, 202; Brown, *Foreigners in Turkey*; Hall, *The Foreign Powers and Jurisdiction of the British Crown*; Jenkyns, *British Rule and Jurisdiction beyond the Seas*; Hinckley, *American Consular Jurisdiction in the Orient*; Hishida, *The International Position of Japan as a Great Power*; Dr. Wellington Koo, *The Status of Aliens in China*; Hyde, I, 448; Moore, *Digest*, II, 593 seq. The meaning and use of the terms "exterritorial" and "extraterritorial" are discussed in Bonfils (Fauchille), sec. 333, and Piggott, *Exterritoriality*, 7. The latter is the best single volume on the subject with which it deals.

CHAPTER VIII

THE ACQUISITION AND TRANSFER OF JURISDICTION.

SECTION 1. THE ACQUISITION OF JURISDICTION BY DISCOVERY AND OCCUPATION.

JOHNSON AND GRAHAM'S LESSEE v. WILLIAM M'INTOSH.

SUPREME COURT OF THE UNITED STATES. 1823.
8 Wheaton, 543.

Error to the District Court of Illinois.

This was an action of ejectment for lands in the State and District of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a grant from the United States. It came up upon a case stated, upon which there was a judgment below for the defendant. . . .

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognized in the Courts of the United States?

The facts, as stated in the case argued, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of pri-

vate individuals to receive, a title which can be sustained in the Courts of this country.

As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely upon the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus

acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title.

France, also, founded her title to the vast territories she claimed in America on discovery. However conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. . . .

The States of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. . . .

No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to *Christian people*, and to take possession of them in the name of the king of England. Two

years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

In this first effort made by the English government to acquire territory on the continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission is confined to countries "then unknown to all Christian people;" and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession notwithstanding the occupancy of the natives, who were heathen, and, at the same time, admitting any prior title of any Christian people who may have made a previous discovery.

Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. . . .

The United States . . . have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

. . .

The Court is decidedly of opinion that the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States; and that there is no error in the judgment which was rendered against them in the District Court of Illinois.

Judgment affirmed, with costs.

NOTE.—Mere discovery is not a sufficient basis for the acquisition of jurisdiction over territory. It must be followed by some act of appropriation amounting to assertion of intent to hold the territory in question. Such an act constitutes occupation. Lord Stowell held that it was impossible for one state to transfer territory to another even by treaty, unless there was also a transfer of possession. In *The Fama* (1804), 5 C. Robinson, 106, 114, he said:

It is to be observed then, that all corporeal property depends very much upon occupancy. With respect to the origin of property, this is the Sole foundation, *Quod nullius est ratione naturalium occupanti conceditur*. So with regard to transfer also, it is universally held in all systems of jurisprudence, that to consummate the right of property, a person must unite the right of the thing with possession. A question has been made indeed by some writers, whether this necessity proceeds from what they call the natural law of nations, or from that which is only conventional. Grotius seems to consider it as proceeding only from civil institutions. Puffendorf and Pothier go farther. All concur, however, in holding it to be a necessary principle of jurisprudence, that to complete the right of property, the right to the thing and the possession of the thing itself, should be united; or according to the technical expression, borrowed either from the civil law, or as Barbeyrac explains it, from the commentators on the Canon Law, that there should be both the *jus in rem*, and the *jus in re*.—This is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly discovered countries, where a title is meant to be established, for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, where the former rights of others are to be superseded, and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion, and under whose laws they are to live. This I conceive to be the general propriety of principle on the subject, and no less applicable to cases of territory than to property of every other description.

On the whole subject see Westlake, *Collected Papers*, 153; Hyde, I, 163; Cobbett, *Cases and Opinions*, I, 110; Moore, *Digest*, I, 258, and Bonfils (Fauchille), sec. 536. See also *Martin v. Waddell* (1842),

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16 Peters, 367; Jones v. United States, (1890), 137 U. S. 202; Shively v. Bowlby (1894), 152 U. S. 1; Whiton v. Albany Insurance Co. (1871), 109 Mass. 24; Mortimer v. New York Elevated Ry. (1889), 6 N. Y. Supp. 898. The doctrine of acquisition by discovery and occupation was involved in the Oregon controversy between Great Britain and the United States. See Twiss, *The Oregon Question*; Moore, *Int. Arb.* I, 196; Moore, *Digest*, I, 457; V, 720. It was also involved in the Venezuela-British Guiana boundary question. See Moore, *Digest*, VI, 533.

SECTION 2. THE ACQUISITION OF JURISDICTION BY PRESCRIPTION.

STATE OF MARYLAND v. STATE OF WEST VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1910.
217 U. S. 1.

Original. In Equity.

MR. JUSTICE DAY delivered the opinion of the court. . . .

It is true there has been more or less contention as to the true boundary line between these States. Attempts have been made to settle and adjust the same, some of which we have referred to, and the details of which may be found in the very interesting document to which we have already made reference, the report of the committee of the Maryland Historical Society. In the proposed settlements, for many years, Virginia and West Virginia have consistently adhered to the Fairfax Stone as a starting point for the disputed boundary. When West Virginia passed the act of 1887, ratifying the Michler line, it was upon condition that Virginia titles granted between the Michler line and the old Maryland line should be validated. Maryland, in the act of 1852, recognized the same starting point.

And the fact remains that after the Deakins survey in 1788 the people living along the line generally regarded that line as the boundary line between the States at bar. In the acts of the legislatures of the two States, to which we have already referred, resulting in the survey and running of the Michler line, it is evident from the language used that the purpose was not to establish a new line, but to retrace the old one, and we are strongly inclined to believe that had this been done at that time the controversy would have been settled.

A perusal of the record satisfies us that for many years occupation and conveyance of the lands on the Virginia side has been with reference to the Deakins line as the boundary line. The people have generally accepted it and have adopted it, and the facts in this connection cannot be ignored. In the case of *Virginia v. Tennessee*, 148 U. S. 503, 522, 523, Mr. Justice Field, speaking for the court, had occasion to make certain comments which are pertinent in this connection, wherein he said:

“Independently of any effect due to the compact as such, a boundary line between States or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke in *Penn v. Lord Baltimore*, 1 Vesey Sen. 444, 448; *Boyd v. Graves*, 4 Wheat. 513; *Rhode Island v. Massachusetts*, 12 Pet. 657, 734; *United States v. Stone*, 2 Wall. 525, 537; *Kellogg v. Smith*, 7 Cush. 375, 382; *Chenery v. Waltham*, 8 Cush. 327; *Hunt on Boundaries* (3d ed.), 396.

“As said by this court in the recent case of the *State of Indiana v. Kentucky*, 136 U. S. 479, 510, ‘it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation’s title and rightful authority.’ In the case of *Rhode Island v. Massachusetts*, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: ‘Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than a case of disputed boundary.’ ”

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And quoting from Vattel on the Law of Nations to the same effect (Sec. 149, p. 190):

“The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title.”

And adds from Wheaton on International Law (Sec. 164, p. 260):

“The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner, as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the articles or property in question.”

And it was said:

“There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to the country, to home and to family, on which is based all that is dearest and most valuable in life.”

In *Louisiana v. Mississippi*, 202 U. S., 1, 53, this court said:

“The question is one of boundary, and this court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both.”

An application of these principles cannot permit us to ignore the conduct of the States and the belief of the people concerning the purpose of the boundary line known as the old state, or Peakins, line, and to which their deeds called as the boundary of their farms, in recognition of which they have established

their allegiance as citizens of the State of West Virginia, and in accordance to which they have fixed their homes and habitations. . . .

The effect to be given to such facts as long continued possession "gradually ripening into that condition which is in conformity with international order," depends upon the merit of individual cases as they arise. 1 Oppenheim International Law, Sec. 243. In this case we think a right, in its nature prescriptive, has arisen, practically undisturbed for many years, not to be overthrown without doing violence to principles of established right and justice equally binding upon States and individuals. *Rhode Island v. Massachusetts*, 12 Pet. 657. . . .

NOTE.—See Moore, *Digest*, I, 293, Hyde I, 192, and Ralston, *International Arbitral Law and Procedure*, 270. The doctrine of acquisition by prescription played an important part in the controversies between the United States and Great Britain as to the boundaries of Venezuela and Alaska. See Cobbett, *Cases and Opinions*, I, 112, 144. Jurisdiction over the Bay of Conception in Newfoundland and Delaware and Chesapeake Bays is based upon the same principle. See *ante*, 155 *seq.* A military occupation based upon conquest may by long continuance result in a transfer of jurisdiction without a formal treaty to that effect, *United States v. Hayward* (1815), 2 Gallison, 485. In such a case the title is derived from prescription rather than from conquest.

SECTION 3. THE ACQUISITION OF JURISDICTION BY CONQUEST.

VAN DEVENTER v. HANCKE AND MOSSOP.

SUPREME COURT OF THE TRANSVAAL. 1903.
Transvaal Law Reports [1903] T. S. 401.

[The defendants, burghers of the South African Republic, were living upon their farm in the district of Vryheid, when in the spring of 1901 a British force appeared, to which they were compelled to surrender. They were later removed to Natal. After their removal, certain wool belonging to them, which was stored on the farm, was confiscated by a Boer officer as the property of burghers who had wrongfully and without permission surrendered to the British troops. It was sold at auction and was purchased by the plaintiff. On the return of the defendants from Natal after the cessation of hostilities, they found

the wool still on their farm and took possession of it. To compel its delivery or the payment of its value, £218, this action was brought. As bearing upon the decision of the case, it should be noted that Lord Roberts, duly authorized thereto by the Queen, issued a proclamation September 1, 1900, annexing the South African Republic to the British Empire. The war still continued until May 31, 1902, when by the so-called treaty of Vereeniging, the Boer generals agreed to surrender.]

INNES, C. J.: . . . The plaintiff bases his claim upon two grounds. In the first place, he says that the wool in question was confiscated in accordance with the laws and military usages of the late South African Republic, and that it thereby became the property of the Republic. In the second place, he says that even if the confiscation was not in accordance with the laws of the late Republic, still it was done in good faith and under martial law by the officers of the Boer forces, and should on that account be upheld. On one or other of the above grounds he contends that the confiscation was valid, and that his title by purchase from the confiscating authority is a good title.

The first of these grounds assumes the existence of the late Republic in March, 1901; it is based upon certain proceedings of officials of that State acting in their capacity as such, and carrying out its laws. Moreover, the Law upon which reliance is chiefly placed is one passed by the Republican Executive in the month of December, 1900—after the date of the British annexation. Such a position cannot, in my opinion, be maintained in this Court. On the 1st September, 1900, and therefore six months before the transactions now in issue took place, the territories known as the South African Republic were by Proclamation No. 15 of 1900 annexed to and declared to form part of, Her Majesty's dominions; and power was given to Lord Roberts, then Commander-in-chief in South Africa, to take such measures and make such laws as he might deem necessary for the peace, order, and good government of the said territories. In March, 1901, therefore, this country, including the district of Vryheid, formed part of the British dominions; and this Court cannot recognise any government or any legislative authority within its limits, after that date, other than the authority and the government of the British Crown.

It was argued for the plaintiff that the Annexation Proclamation was premature; that at the time when this wool was con-

fiscated the district of Vryheid was subject to the *de facto* control and administration of the Boer forces; that although the Proclamation purported to annex the territory of the Transvaal to the empire, there had, at the time of the annexation, been no effectual occupation of it as a country, and no subjugation of its people; and that therefore the Republic continued to exist as a State, and its Government was entitled to exercise legislative and administrative functions. It is no doubt correct as a general rule of international law that two circumstances are necessary to create a complete title by conquest: the conqueror must express in some clear manner his intention of adding the territory in question to his dominions, and he must by the exercise of military force demonstrate his power to hold it as part of his own possessions. It is also true that in March, 1901, large portions of the Transvaal, including the district of Vryheid, were neither occupied nor dominated by British troops; but on the contrary were under the *de facto* control of the Boer forces. And if this were a foreign Court engaged in trying a cause in regard to which the question of when the conquest of the Transvaal was complete became relevant to the inquiry, it is possible that points of considerable intricacy and difficulty would present themselves. But those considerations are not present here. This is a Court constituted by the British Crown, exercising powers and discharging functions derived from the Crown. In its dealing with other States, the Crown acts for the whole nation, and such dealings cannot be questioned or set aside by its Courts. They are acts of State into the validity or invalidity, the wisdom or unwisdom of which domestic Courts of law have no jurisdiction to inquire. . . .

Mr. Smuts [counsel for the plaintiff] argued, however, that the British Government had recognized the continued existence of the South African Republic, or at any rate of its Government, by concluding a treaty of peace with it on the 31st May, 1902; and that this Court, therefore, should also recognise it. I do not so read the Articles of Peace signed at Pretoria. On the contrary, it seems to me that scrupulous care was taken by those who represented the British Government to refrain from any recognition of the South African Republic or its Government, while at the same time they fully recognised the position of certain leaders of a force entitled to all the privileges of belligerents, as being persons with whom it was proper and necessary to treat in regard to the terms upon which that force should lay

down its arms. This is clear to my mind from the language used in describing the capacities of the several signatories and the persons they represented, and the body of the document, while referring to the burgher forces and to the burghers in the field, makes no reference whatever to the Government of either of the two Republics.

For the reasons I have indicated, I am of opinion that this Court cannot recognise the existence of the Government of the South African Republic, or the validity of any laws purporting to be passed by that Government after the 1st September, 1900. This conclusion is fatal to the plaintiff's claim as founded upon the first count of the declaration. . . .

Strictly speaking, it would be possible to dispose of the second count upon the same considerations; because the persons who are stated to have confiscated this wool under martial law are described as officers of the late Republic, and the confiscation relied upon would seem to be a confiscation to the Republican Government under an enactment passed after the date of annexation. But I prefer to consider the alternative claim not from that standpoint, but upon the broad grounds on which it was argued at the trial. Briefly stated, the contention of the plaintiff on this part of his case was as follows: Assuming that the confiscation was not in accordance with such Transvaal law as this Court can recognise, still it was the act of the military officers of a force entitled to belligerent rights, and therefore entitled to enforce martial law—at any rate in respect of the persons and property of its own members. The act was done in good faith, and in furtherance of the prosecution of hostilities in which the defendants as well as the plaintiff were engaged; it was done under martial law, and neither the act itself or its consequences should now be questioned by this Court.

It is not easy to define the exact position which the burgher forces of the Transvaal should be held by a British Court to have occupied after the issue of the Annexation Proclamation. At first sight it would seem that considerable assistance might be derived by resort to American precedent. The Southern Confederacy was not during the Civil War recognized as a Government either by the President or by the Courts of the United States. But there is this fundamental distinction between the two cases: the Confederacy, in spite of its power and its strength, in spite of the fact that it dominated vast tracts of country and controlled and governed a very large population,

was nevertheless essentially an illegal organization, formed for the purpose of rebelling against the constituted authority of the Union. And the attitude taken up by the Supreme Court of the United States towards the Confederacy and towards all acts done in furtherance of the rebellion was due to that consideration. The position of the burgher forces, on the other hand, was not affected by any such taint of illegality. And yet, from the point of view of a British Court, they were a community or body of men possessing no territory as a State and under no form of government which such a Court could recognise as a legal government. But, as between the two contending armies they enjoyed full belligerent rights. The recognition of such rights is quite consistent with a denial of any claim to sovereignty (see *Rose v. Himeley*, 4 Cranch, U. S. Reps. at p. 271), and certainly does not imply that the armed organization to which such recognition was accorded could legally make any regulations affecting the rights of British subjects.

The question is whether the leaders of that community could, in furtherance of the common purpose for which it was striving, deal with the property of its members, without their consent, and whether this Court should recognise such dealing or give effect to its consequences. Without deciding the point, I shall for the purposes of this case assume that they could so deal with the property of those over whom they exercised control. But clearly they could exercise such power to no greater extent than would have been possible if there had been no annexation and if the Republican Government had still been in existence at Pretoria. The fact that a hostile power had issued a Proclamation annexing their territory could not give them more power over the burghers than they possessed before. Consequently we must look to those enactments which, whether they all of them were valid laws or not, were regarded by all members of the burgher forces as having the force of law, in order to see whether the military officers of these forces acted within their rights in confiscating this particular wool—bearing in mind that it was not commandeered for warlike purposes, but was taken from the defendants as a penalty for their alleged offence in having voluntarily surrendered without sufficient cause. . . . [Here follows an examination of the legislation of the South African Republic.]

Assuming that the military authorities of the burgher forces had the same power over the defendants and their property that

they would have had in case no Annexation Proclamation had been issued, I still consider that the confiscation was not justified by the martial law under which action purports to have been taken. . . . Judgment should, therefore, be for the defendants, with costs.

MASON, J.: . . . The first point raised by the defence is, that upon the annexation of the Transvaal by Lord Roberts on the 1st September, 1900, the Government of the South African Republic came to an end, and any acts of its officers in opposition to the British Government can receive no recognition by this Court. . . . The Government of the South African Republic after the annexation either ceased to exist or continued as a Government *de facto* or *de jure*. If the former were the case then the confiscation was invalid, and if the latter then that Government is subject to the laws which it made for itself, or at any rate cannot have greater rights than its alleged constitution confers. . . . It is perfectly true that the Boers were throughout substantially recognised as belligerents, but belligerent rights are rights only against the enemy, not rights of the belligerents *inter se*. These are governed by the municipal law of each belligerent (*Williams v. Bruffy*, 96 U. S. R. 177; *Dewing v. Perdicaries*, 96 U. S. R. 193; *re Venice*, 2 Wall. 258). That municipal law may be contained in special statutes or military codes applicable in time of war, or may be comprised under the wider and less defined jurisdiction of martial law as understood in British jurisprudence. It is, I think, quite clear that where there are definite provisions of military law applying to military offences, those provisions exclude the operation of martial law in those particular cases (*Planters' Bank v. Union Bank*, 16 Wall. 483; *Mrs. Alexander's Cotton*, 2 Wall. 405). . . . [After an examination of the statutes of the South African Republic, the learned judge continues:] It cannot, I think, be successfully contended, and indeed was not contended, that the confiscation in the present case can be justified under these Laws, which lay down a method for dealing with offences of the kind charged against the defendants, with a particularity and jealousy not to be wondered at, when every citizen of the State is made subject to military law and service. . . . There ought to be judgment for the defendants, with costs.

BRISTOWE, J.: . . . In September 1900, Lord Roberts' Proclamation annexing the Transvaal was issued. Mr. Smuts admitted very frankly that the effect of this was to incorporate

the territory of the South African Republic in the British dominions. And I think it is necessary to go a step farther and to say, that inasmuch as, according to modern notions at all events, the possession of territory is essential to the existence of a State, the Proclamation taken in connection with the events which subsequently occurred put an end from the moment of its issue to the existence of the Republic as a political unit. We are then brought face to face with the difficult question of what was the legal position of the burgher forces still remaining in the field. Upon this question there is, so far as I know, no authority; and it may be that the position in which the Boer forces were placed by the Annexation Proclamation was one unexampled in history.

Now, in the first place, these forces were the remains of the fighting force of the South African Republic. There was, as it seems to me, no question of according to them belligerent rights. They were enemies who still remained unconquered. In the second place, they were a community of persons, bound together by ties of blood, actuated by a common purpose, and capable of contracting. So much was admitted by the treaty of Vereeniging, which on the face of it was an agreement between the British Government, on the one hand, and the outstanding burghers acting through their representatives on the other. Moreover, the treaty of Vereeniging recognized them as having a *de facto* Government, for their representatives were described as "acting as the Government of the South African Republic." Indeed, the recognition of their existence as a community involves, as it seems to me, an admission that they had some form of organization or constitution, and that there were certain laws by which they were bound *inter se*.

What, then, was this constitution and what were these laws? Two views were suggested. One is that the outstanding burgher forces carried with them into their exile (if I may be allowed the expression) the laws of their late State, so far as such laws were necessary or applicable to their existence as a military community. The other is, that by some sort of implied agreement or by common consent they became subject to martial law, namely, the expression of the will of their military commanders.

Of these two views the former appears to be the sounder, and I hold that the laws by which the remnant of the Boer forces were bound *inter se* were those of their old State, so far as they were applicable to the military organization, which was all that

then remained. . . . These laws contained no provision authorizing such a confiscation of private property as occurred in the present case. . . . It seems to me that this action fails and must be dismissed, with costs.

NOTE.—Compare *Lemkuhl v. Kock* (1903), Transvaal L. R. [1903] T. S. 451. On the subject of conquest see *Campbell v. Hall* (1774), Cowper, 204; *The Foltina* (1814), 1 Dodson, 450; *In re Southern Rhodesia* (1918), L. R. [1919] A. C. 211 (an excellent discussion); Westlake, *Collected Papers*, 475; Cobbett, *Cases and Opinions*, II, 244; Hyde, I, 175; Moore, *Digest*, I, 290. Bonfils (Fauchille) sec. 535, argues that conquest does not confer a valid title. "Taking possession by violence is merely a brutal fact." Other writers have taken a similar view, but in international practice conquest is recognized as a valid basis of title. In addition to the conquest of the Boer states in 1900, there were the conquest and absorption of numerous German states by Prussia between 1866 and 1870, the annexation of Bosnia and Herzegovina by Austria in 1908, the annexation of Korea by Japan in 1910, and the proclamation of the annexation of Cyrenaica and Tripoli by Italy in 1912 in the midst of its war with Turkey. While military measures were not necessary in all these cases, the process was in all essentials a conquest and the title of the annexing state rested upon the fact that it was strong enough to carry out its desires. A completed conquest is usually announced by some formal act, but this is not essential. As was said by Lord Sumner, "It is only declaratory of a state of fact. In itself it is no more indispensable than is a declaration of war at the commencement of hostilities," *In re Southern Rhodesia* (1918), L. R. [1919] A. C. 211, 240.

If realities rather than forms are regarded, many cases of cession will be seen to be conquests. If the cession is voluntary, as the cession of Heligoland by Great Britain to Germany and the cession of the Danish West Indies by Denmark to the United States, no element of conquest is involved. But if the cession is compulsory, as were the cession of Porto Rico to the United States and of Alsace-Lorraine to Prussia and its retro-cession to France, the new title is based upon conquest even though the transfer is effected by means of a treaty of cession.

SECTION 4. THE ACQUISITION OF JURISDICTION BY CESSION.

THE AMERICAN INSURANCE COMPANY AND THE
OCEAN INSURANCE COMPANY OF NEW YORK,
Appellants, v. 356 BALES OF COTTON,
DAVID CANTER, Claimant and
Appellee.

SUPREME COURT OF THE UNITED STATES. 1828.
1 Peters, 511.

MARSHALL, C. J., delivered the opinion of the court.

The plaintiffs filed their libel in this cause in the district court of South Carolina, to obtain restitution of 356 bales of cotton, part of the cargo of the ship *Point a Petre*; which had been insured by them on a voyage from New Orleans to Havre de Grace, in France. The *Point a Petre* was wrecked on the coast of Florida, the cargo saved by the inhabitants and carried into Key West, where it was sold for the purpose of satisfying the salvors; by virtue of a decree of a court consisting of a notary and five jurors, which was erected by an act of the territorial legislature of Florida. . . .

The cause depends mainly on the question whether the property in the cargo saved was changed by the sale at Key West. . . . Its validity has been denied on the ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an act of the territorial legislature of Florida, passed on the 4th July, 1823, which is inserted in the record. That act purports to give the power which has been exercised; consequently, the sale is valid, if the territorial legislature was competent to enact the law.

The course which the argument has taken, will require that, in deciding this question, the court should take into view the relation in which Florida stands to the United States.

The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed,

and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly created power of the state.

On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision: "The inhabitants of the territories which his Catholic majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States." 8 Stats. at Large, 252.

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States." . . .

DE LIMA v. BIDWELL.

SUPREME COURT OF THE UNITED STATES. 1901.
182 U. S. 1.

This was an action originally instituted in the Supreme Court

of the State of New York by the firm of D. A. De Lima & Co., against the collector of the port of New York, to recover back duties alleged to have been illegally exacted and paid under protest, upon certain importations of sugar from San Juan in the island of Porto Rico, during the Autumn of 1899, and subsequent to the cession of the island to the United States. . . .

The dates here given become material:

In July 1898, Porto Rico was invaded by the military forces of the United States under General Miles.

On August 12, 1898, during the progress of the campaign a protocol was entered into between the Secretary of State and the French Ambassador on the part of Spain, providing for a suspension of hostilities, the cession of the island and the conclusion of a treaty of peace. 30 Stat. 1742.

On October 18, Porto Rico was evacuated by the Spanish forces.

On December 10, 1898, such treaty was signed at Paris, (under which Spain ceded to the United States the island of Porto Rico,) was ratified by the President and Senate, February 6, 1899, and by the Queen Regent of Spain, March 19, 1899. 30 Stat. 1754.

On March 2, 1899, an act was passed making an appropriation to carry out the obligations of the treaty.

On April 11, 1899, the ratifications were exchanged, and the treaty proclaimed at Washington.

On April 12, 1900, an act was passed, commonly called the Foraker act, to provide temporary revenues and a civil government for Porto Rico, which took effect May 1, 1900. . . .

MR. JUSTICE BROWN delivered the opinion of the court.

This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a "foreign country" within the meaning of the tariff laws.

Whether these cargoes of sugar were subject to duty depends solely upon the question whether Porto Rico was a "foreign country" at the time the sugars were shipped, since the tariff act of July 24, 1897, 30 Stat. 151, commonly known as the Dingley act, declares that "there shall be levied, collected and paid upon all articles imported from foreign countries" certain duties therein specified. A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be exclusively

one within the sovereignty of a foreign nation, and without the sovereignty of the United States. *The Boat Eliza*, 2 Gall. 4; *Taber v. United States*, 1 Story, 1; *The Ship Adventure*, 1 Brock, 235, 241.

The status of Porto Rico was this: The island had been for some months under military occupation by the United States as a conquered country, when, by the second article of the treaty of peace between the United States and Spain, signed December 10, 1898, and ratified April 11, 1899, Spain ceded to the United States the island of Porto Rico, which has ever since remained in our possession, and has been governed and administered by us. If the case depended solely upon these facts, and the question were broadly presented whether a country which had been ceded to us, the cession accepted, possession delivered, and the island occupied and administered without interference by Spain or any other power, was a foreign country or domestic territory, it would seem that there could be as little hesitation in answering this question as there would be in determining the ownership of a house deeded in fee simple to a purchaser, who had accepted the deed, gone into possession, paid taxes and made improvements without let or hindrance from his vendor. But it is earnestly insisted by the Government that it never could have been the intention of Congress to admit Porto Rico into a customs union with the United States, and that, while the island may be to a certain extent domestic territory, it still remains a "foreign country" under the tariff laws, until Congress has embraced it within the general revenue system.

We shall consider this subject more at length hereafter, but for the present call attention to certain cases in this court and certain regulations of the executive departments which are supposed to favor this contention. . . .

[The learned judge here examined *United States v. Rice* (1819), 4 Wheaton, 246; *Fleming v. Page* (1850), 9 Howard, 603; *Cross v. Harrison* (1854), 16 Howard, 164; and the practice and rulings of the executive departments as to the status of Louisiana, Florida, Texas, California and Alaska before their status was determined by Congress.]

From this *résumé* of the decisions of this court, the instructions of the executive departments, and the above act of Congress, it is evident that, from 1803, the date of Mr. Gallatin's letter, to the present time, there is not a shred of authority, except the dictum in *Fleming v. Page* (practically overruled in

Cross v. Harrison), for holding that a district ceded to and in the possession of the United States remains for any purpose a foreign country. Both these conditions must exist to produce a change of nationality for revenue purposes. Possession is not alone sufficient, as was held in *Fleming v. Page*, nor is a treaty ceding such territory sufficient without a surrender of possession, *Keene v. McDonough*, 8 Pet. 308; *Pollard's Heirs v. Kibbe*, 14 Pet. 353, 406; *Hallet v. Hunt*, 7 Ala. 899; *The Fama*, 5 Ch. Rob. 97. The practice of the executive departments, thus continued for more than half a century, is entitled to great weight, and should not be disregarded nor overturned except for cogent reasons, and unless it be clear that such construction be erroneous. *United States v. Johnson*, 124 U. S. 236, and other cases cited.

But were this presented as an original question we should be impelled irresistibly to the same conclusion.

By Article II, section 2, of the Constitution, the President is given power, "by and with the advice and consent of the Senate, to make treaties, provided that two-thirds of the senators present concur"; and by Art. VI, "this Constitution and the laws of the United States, which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land." It will be observed that no distinction is made as to the question of supremacy between laws and treaties, except that both are controlled by the Constitution. A law requires the assent of both houses of Congress, and, except in certain specified cases, the signature of the President. A treaty is negotiated and made by the President, with the concurrence of two-thirds of the senators present, but each of them is the supreme law of the land.

As was said by Chief Justice Marshall in *The Peggy*, 1 Cranch, 103, 110: "Where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court as an act of Congress." And in *Foster v. Neilson*, 2 Pet. 253, 314, he repeated this in substance: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." So in *Whitney v. Robertson*, 124 U. S. 190: "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation.

Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing." To the same effect are the *Cherokee Tobacco*, 11 Wall. 616, and the *Head Money cases*, 112 U. S. 580.

One of the ordinary incidents of a treaty is the cession of territory. It is not too much to say it is the rule, rather than the exception, that a treaty of peace, following upon a war, provides for a cession of territory to the victorious party. It was said by Chief Justice Marshall in *American Ins. Co. v. Canter*, 1 Pet. 511, 542: "The Constitution confers absolutely upon the Government of the Union the powers of making war and of making treaties; consequently that Government possesses the power of acquiring territory, either by conquest or by treaty." The territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress.

It follows from this that by the ratification of the treaty of Paris the island became territory of the United States—although not an organized territory in the technical sense of the word.

Territory thus acquired can remain a foreign country under the tariff laws only upon one of two theories; either that the word "foreign" applies to such countries as were foreign at the time the statute was enacted, notwithstanding any subsequent change in their condition, or that they remain foreign under the tariff laws until Congress has formally embraced them within the customs union of the States. The first theory is obviously untenable. While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope. Thus, a statute forbidding the sale of liquors to minors applies not only to minors in existence at the time the statute was enacted, but to all who are subsequently born; and ceases to apply to such as thereafter reach their majority. So, when the Constitution of the United States declares in Art. I, sec. 10, that the States

shall not do certain things, this declaration operates not only upon the thirteen original States, but also upon all who subsequently become such; and when Congress places certain restrictions upon the powers of a territorial legislature, such restrictions cease to operate the moment such territory is admitted as a State. By parity of reasoning a country ceases to be foreign the instant it becomes domestic. So, too, if Congress saw fit to cede one of its newly acquired territories (even assuming that it had the right to do so) to a foreign power, there could be no doubt that from the day of such cession and the delivery of possession, such territory would become a foreign country, and be reinstated as such under the tariff laws. Certainly no act of Congress would be necessary in such case to declare that the laws of the United States had ceased to apply to it.

The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the Customs Union, presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary for the adequate administration of a domestic territory to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States. We express no opinion as to whether Congress is bound to appropriate the money to pay for it. This has been much discussed by writers upon constitutional law, but it is not necessary to consider it in this case, as Congress made prompt appropriation of the money stipulated in the treaty. This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. It is true the non-

action of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words.

If an act of Congress be necessary to convert a foreign country into domestic territory, the question at once suggests itself, what is the character of the legislation demanded for this purpose? Will an act appropriating money for its purchase be sufficient? Apparently not. Will an act appropriating the duties collected upon imports to and from such country for the benefit of its government be sufficient? Apparently not. Will acts making appropriations for its postal service, for the establishment of lighthouses, for the maintenance of quarantine stations, for erecting public buildings, have that effect? Will an act establishing a complete local government, but with the reservation of a right to collect duties upon commerce, be adequate for that purpose? None of these, nor all together, will be sufficient, if the contention of the Government be sound, since acts embracing all these provisions have been passed in connection with Porto Rico, and it is insisted that it is still a foreign country within the meaning of the tariff laws. We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic. . . .

We are therefore of opinion that at the time these duties were levied Porto Rico was not a foreign country within the meaning of the tariff laws but a territory of the United States, that the duties were illegally exacted and that the plaintiffs are entitled to recover them back.

The judgment of the Circuit Court for the Southern District of New York is therefore reversed and the case remanded to that court for further proceedings in consonance with this opinion.

MR. JUSTICE MCKENNA, (with whom concurred MR. JUSTICE SHIRAS and MR. JUSTICE WHITE,) dissenting. . . .

NOTE.—Cession as a means of transferring jurisdiction from one state to another may be voluntary, as in the case of a sale or exchange of territories, or it may be involuntary, as in the case of the surrender of territories in consequence of defeat in war or a threat of use of force. In the history of the United States the purchase of Louisiana from France in 1803, of Florida from Spain in 1819, of Alaska from Russia in 1867 and of the Danish West Indies from Denmark in 1916 are examples of the former, while the forcible taking of California from Mexico in 1848 and of Porto Rico and the Philippines from Spain in 1898 are examples of the latter. The voluntary union of one country with another, such as the union of Texas and

Hawaii with the United States, may also be described as a cession. Relinquishment should be distinguished from cession, since the former sovereign merely withdraws its jurisdiction without naming a grantee. Thus Spain relinquished its sovereignty over Cuba in 1898. The treaty of Versailles contains numerous clauses (conveniently arranged in Hyde, I, 178 note) in which Germany renounces its sovereignty over various territories in favor of a particular state or group of states. Such a renunciation has all the marks of a cession.

Cessions are usually effected by formal treaties which not only delimit the ceded territory, but also provide for the disposition of the public property therein and often contain stipulations as to the civil status of the inhabitants. A cession may be also effected by a mere offer and acceptance, as was done when Texas and Hawaii were annexed to the United States. Without a treaty or other formal act the long-continued occupation of neutral territory by the enemy in time of peace with the concurrence of the neutral sovereign may be construed as evidence that the occupation was the result of cession. *The Bolleta* (1809), Edwards, 171. See Phillipson, *The Termination of War and Treaties of Peace*; Hyde, I, 177; Bonfils (Fauchille), sec. 567; Moore, *Digest*, I, 273.

As the acquisition of jurisdiction, whether by formal cession or otherwise, is an act of state, its terms rest in the discretion of the annexing government, and more often than not the transaction presents no justiciable question. Among the many decisions to this effect are *Nabob of the Carnatic v. East India Co.* (1791), 1 Ves. Jr. 371, 2 Ves. Jr. 55; *Elphinstone v. Bedreechund* (1830), 1 Knapp, P. C. 316; *Secretary of State in Council of India v. Kamachee Boye Sahaba* (1859), 7 Moore, Ind. App. 476; *Doss v. Secretary of State for India* (1875), L. R. 19 Eq. 509; *Rustomjee v. The Queen*, (1876), 1 Q. B. D. 487, 2 Q. B. D. 69; *Cook v. Sprigg* (1899), L. R. [1899] A. C. 572; *West Rand Central Gold Mining Co., Ltd., v. The King* (1905), L. R. [1905] 2 K. B. 391.

CHAPTER VIII.

EFFECTS OF THE TRANSFER OF JURISDICTION.

SECTION 1. EFFECT ON PUBLIC AND PRIVATE LAW.

THE ADVOCATE-GENERAL OF BENGAL v. RANEE SURNOMOYE DOSSEE.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1863.
2 Moore, Privy Council (N. S.), 22.

On appeal from the Supreme Court at Calcutta.

The question in this case was whether the interest of a Hindoo, a British subject, in a fund which was standing to the credit of an account in a cause in the Supreme Court at Calcutta, had been forfeited to the Crown, by reason of his having committed suicide in Calcutta, and found *felo de se* by a coroner's jury there. . . .

The Right Hon. LORD KINGSDOWN: The question in this case arises on the claim of the Crown to a portion of the personal estate of Rajah Kistonaath Roy, who destroyed himself in Calcutta on the 31st of October, 1844, and was found by inquisition to have been *felo de se*. . . . He was a Hindoo both by birth and religion. . . .

At what time then, and in what manner, did the forfeiture attached by the law of England to the personal property of persons committing suicide in that country, become extended to a Hindoo committing the same act in Calcutta?

The sum of the Appellant's argument was this:—that the English Criminal law was applicable to Natives as well as Europeans within Calcutta, at the time when the death of the Rajah took place, and the sovereignty of the English Crown was at that time established; that the English settlers when they first went out to the East Indies in the reign of Queen Eliza-

beth took with them the whole law of England, both Civil and Criminal, unless so far as it was inapplicable to them in their new condition; that the law of *felo de se* was a part of the Criminal law of England which was not inapplicable to them in their new condition, and that it, therefore, became part of the law of the country.

Where Englishmen establish themselves in an uninhabited barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of, and subject to the same laws.

But this was not the nature of the first settlement made in India—it was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country, under the government of a powerful Mahomedan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

If the settlement had been made in a Christian country of Europe, the settlers would have become subject to the laws of the country in which they settled. It is true that in India they retained their own laws for their own government within the Factories, which they were permitted by the ruling powers of India to establish; but this was not on the ground of general international law, or because the Crown of England or the laws of England had any proper authority in India, but upon the principles explained by Lord Stowell in a very celebrated and beautiful passage of his judgment in the case of "The Indian Chief" (3 Rob. Adm. Rep. 28).

The laws and usages of Eastern countries where Christianity does not prevail are so at variance with all the principles, feelings, and habits of European Christians that they have usually been allowed by the indulgence or weakness of the Potentates of those countries to retain the use of their own laws, and their Factories have for many purposes been treated as part of the territory of the Sovereign from whose dominions they come. But the permission to use their own laws by European settlers does not extend those laws to Natives within the same limits, who remain to all intents and purposes subjects of their own Sovereign, and to whom European laws and usages are as little suited as the laws of the Mahometans and Hindoos are suited to Europeans. These principles are too clear to require any

authority to support them, but they are recognized in the judgment to which we have above referred.

But, if the English laws were not applicable to Hindoos on the first settlement of the country, how could the subsequent acquisition of the rights of sovereignty by the English Crown make any alteration? It might enable the Crown by express enactment to alter the laws of the country, but until so altered the laws remained unchanged. The question, therefore, and the sole question in this case is, whether by express enactment the English law of *felo de se*, including the forfeiture attached to it, had been extended in the year 1844 to Hindoos destroying themselves in Calcutta.

We were referred by Mr. Melvill in his very able argument, to the Charter of Charles II. in 1661, as the first, and indeed the only one which in express terms introduces English law into the East Indies. It gave authority to the Company to appoint Governors of the several places where they had or should have Factories, and it authorized such Governors and their Council to judge all persons belonging to the said Company, or that should live under them, in all causes, whether Civil or Criminal, according to the laws of the Kingdom of England, and to execute judgment accordingly.

The English Crown, however, at this time clearly had no jurisdiction over native subjects of the Mogul, and the Charter was admitted by Mr. Melvill (as we understood him) to apply only to the European servants of the Company; at all events it could have no application to the question now under consideration. The English law, Civil and Criminal, has been usually considered to have been made applicable to Natives, within the limits of Calcutta, in the year 1726, by the Charter, 13th Geo. 1. Neither that nor the subsequent Charters expressly declare that the English law shall be so applied, but it seems to have been held to be the necessary consequence of the provisions contained in them.

But none of these Charters contained any forms applicable to the punishment, by forfeiture or otherwise, of the crime of self-murder, and with respect to other offences to which the Charters did extend, the application of the criminal law of England to Natives not Christians, to Mahomedans and Hindoos, has been treated as subject to qualifications without which the execution of the law would have been attended with intolerable injustice and cruelty.

To apply the law which punishes the marrying a second wife whilst the first is living, to a people amongst whom polygamy is a recognized institution, would have been monstrous, and accordingly it has not been so applied.

In like manner, the law, which in England most justly punishes as a heinous offence, the carnal knowledge of a female under ten years of age, cannot with any propriety be applied to a country where puberty commences at a much earlier age, and where females are not unfrequently married at the age of ten years.

Accordingly, in the case referred to in the argument, the law was held not to apply.

Is the law of forfeiture for suicide one which can be considered properly applicable to Hindoos and Mahomedans?

The grounds on which suicide is treated in England as an offence against the law, and punished by forfeiture of the offender's goods and chattels to the King, are stated more fully in the case of *Hales v. Petit*, in *Plowden's Reports*, p. 261, than in any other book which we have met with. It is there stated, that it is an offence against nature, against God, and against the King. Against nature, because against the instinct of self-preservation; against God, because against the commandment, "Thou shalt not kill," and a *felo de se* kills his own soul; against the King, in that thereby he loses a subject.

Can these considerations extend to native Indians, not Christians, not recognizing the authority of the Decalogue, and owing at the time when this law is supposed to have been introduced no allegiance to the King of Great Britain?

The nature of the punishment also is very little applicable to such persons. A part of it is, that the body of the offender should be deprived of the rites of Christian burial in consecrated ground. The forfeiture extends to chattels real and personal, but not to real estates; these distinctions, at least in the sense in which they are understood in England, not being known or intelligible to Hindoos and Mahomedans.

Self-destruction, though treated by the law of England as Murder, and spoken of in the case to which we have referred in *Plowden* as the worst of all Murders, is really, as it affects society, and in a moral and religious point of view, of a character very different not only from all other Murders, but from all other Felonies. These distinctions are pointed out with great force and clearness in the notes attached to the Indian Code,

as originally prepared by Lord Macaulay and the other Commissioners. The truth is, that the act is one which in countries not influenced by the doctrines of Christianity has been regarded as deriving its moral character altogether from the circumstances in which it is committed:—sometimes as blameable, sometimes as justifiable, sometimes as meritorious, or even an act of positive duty.

In this light suicide seems to have been viewed by the founders of the Hindoo Code, who condemn it in ordinary cases as forbidden by their religion; but in others, as in the well-known instances of Suttee and self-immolation under the car of Juggernaut, treat it as an act of great religious merit.

We think, therefore, the law under consideration inapplicable to Hindoos, and if it had been introduced by the Charters in question with respect to Europeans, we should think that Hindoos would have been excepted from its operation. But that it was not so introduced appears to us to be shown by the admirable judgment of Sir Barnes Peacock in this case; and if it were not so introduced, then as regards Natives, it never had any existence.

It would not necessarily follow that, therefore, it never had existed as regards Europeans. That question would depend upon this, whether, when the original settlers, under the protection of their own Sovereign, were governed by their own laws, those laws included the one now under consideration; whether an offence of this description was an offence against the King's peace, for which he was entitled to claim forfeiture; whether the Factory could for this purpose be considered as within his jurisdiction. In that case it might be that the subsequent appointment of Coroners by the Act of 33rd Geo. III would render effectual a right previously existing, but for the recovery of which no adequate remedy had been previously provided.

We are not quite sure whether the Court below intended to determine this point or not. Much of the reasoning in the judgment is applicable to Europeans as well as to Natives, but the Chief Justice in his judgment says:—"At present we have merely to consider the question, so far as it relates to the goods and chattels of a Native who wilfully and intentionally destroys himself, and who cannot in strictness be called a *felo*

de se; and we now proceed to deal with that question, and with that question alone."

The point so decided we think perfectly clear, and it is not necessary to go further. Since the new Code, which confines the penalty of forfeiture within much narrower limits than existed previously to its enactment, and does not extend it to the property of persons committing suicide, the case can hardly again arise.

We have no doubt that it is our duty in this case, humbly to advise Her Majesty to dismiss the appeal, with costs.

THE PHILIPPINE SUGAR ESTATES DEVELOPMENT
COMPANY (LIMITED) v. THE UNITED STATES.

COURT OF CLAIMS OF THE UNITED STATES. 1904.
39 Ct. Cl. 225.

[The claimant, a corporation chartered at Manila in the Philippine Islands in 1900 in accordance with the provisions of the Spanish law in force in the Islands prior to their cession to the United States, sues for the rent of its premises which had been taken for the use of the American troops. Such rent had not been paid because question had been raised as to the true ownership of the property.]

HARVEY, J., delivered the opinion of the court. . . .

A more serious question is presented in considering the competency of the local authorities to create the plaintiff a corporation. If that authority did not exist, then plaintiff acquired no legal existence and has none now.

The company was organized under the Spanish law claimed by plaintiff to be in force in the Philippine Islands after the treaty of Paris. Articles incorporating plaintiff were executed in January, 1900, and were duly recorded in the Mercantile Registry of Manila soon thereafter. The treaty which ceded the islands to the United States was signed December 10, 1898, and ratified the following April. During this time Manila was under the military control of the United States, and the municipal law of the place was administered and enforced by the military government, except as modified by the military authorities.

When the treaty ceding the islands was ratified the sovereignty of the United States became absolute. Translations of the laws then in force in the ceded territory were published and issued by authority of the Secretary of War. This included the civil code and the code of commerce, which regulated rights of property and prescribed rules for commercial transactions and embraced the rules under which commercial associations are formed and regulated. The translation recited that the code of commerce was in force. (Divisions of Customs and Insular Affairs, October, 1899.) Some changes were subsequently made (laws of Philippine Commission, 1901), as, for example, the repeal of a chapter of the code (p. 132), but no changes affecting the methods of incorporating companies had been made at the time of the incorporation of this association.

If, at the time of the cession of the archipelago, only such laws were continued in force as did not involve a sovereign grant—the right to any kind of a charter under local regulations being included—as contended by the defendants upon the eminent authority of the late civil governor of the ceded territory, then the laws granting corporate rights became entirely inoperative after the cession and a check was immediately and indefinitely put upon the formation of partnerships, general and limited, the organization of joint stock companies and associations of different kinds incident to the commercial and industrial life of the ceded country and as necessary there as in other parts of the world.

The general rule of international law in regard to all conquered or ceded territory is that the old laws continue until repealed by the proper authorities. (Woolsey's Int. Law, sec. 161.)

In conquered or ceded countries that have already laws of their own, the king may alter and change those laws; but till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, and in the case of an infidel country. (1 Blackstone, 107, Lewis's ed.)

In *Chew v. Calvert* it was held that the laws of Spain continued in force in Mississippi until after the territorial government was organized under act of Congress April 7, 1798. (1 Walk., Miss R., 56.)

In *Norris v. Harris* (15 Cal., 253) it was held that the presumption that the common law prevails in those States originally colonies of England does not extend to States like Florida,

Louisiana, and Texas, where organized governments existed at the time of their accession to the country, which laws remained in force until abrogated and new laws promulgated.

In *Am. Ins. Co. v. Canter* (1 Pet., 511), while discussing the effect of the cession of territory by treaty, Chief Justice Marshall said:

"On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State." . . .

Special privileges, grants, or franchises flowing from the grace and pleasure of the sovereign in favor of some one particular person or body distinguished from the general body of the inhabitants are the things forbidden. It needs no reference to international law to say that any exercise of authority by the ceding sovereignty, after cession, could not have force with reference to such things as grants of land, or the bestowal of special franchises, such as the construction of roads, the keeping of ferries, and the erection of bridges with the right to collect toll upon them. These are grants by the authority of the State as particular privileges which look to the promotion and protection of the public good. But the municipal laws promulgated during the time the ceding authority existed and which are generally recognized as necessary to the peace and good order of the community remained in full force and effect. Any other rule would hold in abeyance civil functions with respect to the use, enjoyment, and transfer of private property that would lead to results harmful to the inhabitants of the ceded territory and injurious to the best interests and authority of the new sovereign as well. This is something that has not been tolerated in modern times.

During the military occupation, and while a state of war yet existed between the two countries, the United States expressly recognized the continuance of the municipal laws of the conquered territory. The military occupancy, though absolute and supreme, operated only upon the political condition of the peo-

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ple without affecting private rights of person and property. Under these municipal laws partnerships were formed and joint-stock associations organized, and the ordinary and commercial transactions of the country proceeded, as nearly alike as the changed conditions would admit, as before. And after peace was declared the authority of the United States was directed to be exerted for the security of the persons and property of the people of the islands and for the confirmation of all their private rights and relations. The municipal laws of the territories in respect to these private rights and property were to be considered as continuing in force, to be administered by the ordinary tribunals as far as practicable. (Presidents' Messages, 10 Richardson, 209, 220.)

This action of the Government merely emphasized the distinction existing between the municipal laws, which regulated and protected the relations of the many, and the power of the sovereign, which only could grant franchises and special privileges to the few. Such distinction was indicated in the local law classifying judicial persons into corporations, associations, and institutions of public interest, and associations of private interest, civil, commercial, or industrial. (Art. 35, Civil Code.) Pursuant to which it was provided that the civil capacity of corporations should be governed by the laws creating or recognizing them—that is to say, by their charters or gifts of franchises—while the civil capacity of private associations was to be determined by their by-laws. (Art. 38, id.)

The things prohibited were grants or concessions of public or corporate rights or franchises for the construction of public or quasi public works, such as railroads, tramways, telegraph and telephone lines, waterworks, gas works, electric light lines, etc. (Executive order of December 22, 1898, id. 221.)

Independent of all these considerations plaintiff was a *de facto* association with the right of possession and the right to give lawful discharge for the use and occupation of its property. Governor Taft recognized this, going so far as to say that plaintiff could probably hold title, or, in any event, payment to it would be a complete defense to any claim made by the Dominican friars, because their dealings with the corporation would be held to estop them from denying its corporate existence. (Off. Letter to the Maj. Gen., Com. Div. of the Philippines, March 16, 1903.) We are unable to see why plaintiff's collection of the rent due to it as an association would not be a law-

ful acquittance of any claim against the occupants of the property. The incorporation was compatible with the new order of things. The association was given life by the same municipal law that was authorized to create either a general or a limited partnership. This law we have seen was neither abrogated nor impaired by the change of government. No other person or association of persons could rightfully claim the rental value, and payment to this company does not put the Government in danger of paying twice. It is true that if plaintiff had been dispossessed the new occupants could set up against a claim for rent an outstanding title in another, because that would not preclude the occupants from showing a better outstanding title. But this defendants have not done and do not propose to do further than to say that the real parties in interest are the friars, who are not claiming. . . . Judgment will be entered for plaintiff.

VILAS v. CITY OF MANILA.

SUPREME COURT OF THE UNITED STATES. 1911.
220 U. S. 345.

Error to and appeals from the Supreme Court of the Philippine Islands.

MR. JUSTICE LURTON delivered the opinion of the court.

The plaintiffs in error, who were plaintiffs below, are creditors of the city of Manila as it existed before the cession of the Philippine Islands to the United States by the treaty of Paris, December 10, 1898. Upon the theory that the city under its present charter from the government of the Philippine Islands is the same juristic person and liable upon the obligations of the old city, these actions were brought against it. The Supreme Court of the Philippine Islands denied relief, holding that the present municipality is a totally different corporate entity, and in no way liable for the debts of the Spanish municipality.

The fundamental question is whether, notwithstanding the cession of the Philippine Islands to the United States, followed by a reincorporation of the city, the present municipality is liable for the obligations of the city incurred prior to the cession to the United States. . . .

The city as now incorporated has succeeded to all of the property rights of the old city and to the right to enforce all of its causes of action. There is identity of purpose between the Spanish and American charters and substantial identity of municipal powers. The area and the inhabitants incorporated are substantially the same. But for the change of sovereignty which has occurred under the treaty of Paris, the question of the liability of the city under its new charter for the debts of the old city would seem to be of easy solution. The principal question would therefore seem to be the legal consequence of the cession referred to upon the property rights and civil obligations of the city incurred before the cession. And so the question was made to turn in the court below upon the consequence of a change in sovereignty and a reincorporation of the city by the substituted sovereignty. . . .

The historical continuity of a municipality embracing the inhabitants of the territory now occupied by the city of Manila is impressive. Before the conquest of the Philippine Islands by Spain, Manila existed. The Spaniards found on the spot now occupied a populous and fortified community of Moros. In 1571 they occupied what was then and is now known as Manila, and established it as a municipal corporation. In 1574 there was conferred upon it the title of "Illustrious and ever loyal city of Manila." From time to time there occurred amendments, and, on January 19, 1894, there was reorganization of the city government under a royal decree of that date. Under the charter there was power to incur debts for municipal purposes and power to sue and be sued. The obligations here in suit were incurred under the charter referred to, and are obviously obligations strictly within the provision of the municipal power. To pay judgments upon such debt it was the duty of the Ayuntamiento of Manila, which was the corporate name of the old city, to make provision in its budget.

The contention that the liability of the city upon such obligations was destroyed by a mere change of sovereignty is obviously one which is without a shadow of moral force, and, if true, must result from settled principles of rigid law. While the contracts from which the claims in suit resulted were in progress, war between the United States and Spain ensued. On August 13, 1898, the city was occupied by the forces of this Government and its affairs conducted by military authority. On July 31, 1901, the present incorporating act was passed, and the city

since that time has been an autonomous municipality. The charter in force is act 183 of the Philippine Commission and now may be found as chapters 68 to 75 of the Compiled Acts of the Philippine Commission. . . .

The charter contains no reference to the obligations or contracts of the old city.

If we understand the argument against the liability here asserted, it proceeds mainly upon the theory that inasmuch as the predecessor of the present city, the Ayuntamiento of Manila, was a corporate entity created by the Spanish government, when the sovereignty of Spain in the islands was terminated by the treaty of cession, if not by the capitulation of August 13, 1908, the municipality *ipso facto* disappeared for all purposes. This conclusion is reached upon the supposed analogy to the doctrine of principal and agent, the death of the principal ending the agency. So complete is the supposed death and annihilation of a municipal entity by extinction of sovereignty of the creating State that it was said in one of the opinions below that all of the public property of Manila passed to the United States, "for a consideration, which was paid," and that the United States was therefore justified in creating an absolutely new municipality and endowing it with all of the assets of the defunct city, free from any obligation to the creditors of that city. And so the matter was dismissed in the Trigas Case by the Court of First Instance, by the suggestion that "the plaintiff may have a claim against the crown of Spain, which has received from the United States payment for that done by the plaintiff."

We are unable to agree with the argument. It loses sight of the dual character of municipal corporations. They exercise powers which are governmental and powers which are of a private or business character. In one character a municipal corporation is a governmental sub-division, and for that purpose exercises by delegation a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred. . . .

In view of the dual character of municipal corporations there is no public reason for presuming their total dissolution as a mere consequence of military occupation or territorial cession.

The suspension of such governmental functions as are obviously incompatible with the new political relations thus brought about may be presumed. But no such implication may be reasonably indulged beyond that result.

Such a conclusion is in harmony with the settled principles of public law as declared by this and other courts and expounded by the text books upon the laws of war and international law. Taylor, *International Public Law*, Sec. 578.

That there is a total abrogation of the former political relations of the inhabitants of the ceded region is obvious. That all laws theretofore in force which are in conflict with the political character, constitution or institutions of the substituted sovereign lose their force, is also plain. *Alvarez v. United States*, 216 U. S. 167. But it is equally settled in the same public law that that great body of municipal law which regulates private and domestic rights continues in force until abrogated or changed by the new ruler. In *Chicago, Rock Island & Pacific Railway Co. v. McGlinn*, 114 U. S. 524, 546, it was said:

"It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity,

which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed. . . ."

That the United States might, by virtue of its situation under a treaty ceding full title, have utterly extinguished every municipality which it found in existence in the Philippine Islands may be conceded. That it did so in view of the practice of nations to the contrary is not to be presumed and can only be established by cogent evidence. . . .

NOTE.—See also: *Townsend v. Greeley* (1867), 5 Wallace, 326; *Merryman v. Bourne* (1870), 9 Ib. 592; *More v. Steinbach* (1888), 127 U. S. 70; *Los Angeles Farming and Milling Co. v. Los Angeles* (1910), 217 U. S. 217, and the cases there cited.

In practice and quite apart from any legal theory, the effect of the transfer of jurisdiction from one country to another depends much upon the size of the population of the district in question. If small it is not likely to be able to preserve its identity, but will be absorbed by the annexing state and will take the latter's system of law. The old system will continue in force however until the new one is established. The transfer of jurisdiction may also be followed by such a volume of immigration from the territory of the new sovereign as to alter entirely the character of the original population, and lead to the introduction of a new legal system. A change of this sort occurred in Utah after its transfer from Mexico to the United States, *First National Bank v. Kinner* (1873), (1 Utah, 100. If the newly acquired lands are entirely without a civilized population, it is the Anglo-American doctrine that British or American citizens occupying such districts take their own law with them, or as expressed by Chief Justice Holt in *Blankard v. Galdy* (1693), 2 Salkeld, 411, "In case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there."

For the status of the common law in Massachusetts see the opinion of Chief Justice Shaw in *Commonwealth v. Chapman* (1847), 13 Metcalf (Mass.), 68, and for its introduction into Oklahoma see *McKennon v. Winn* (1893), 1 Ok. 327. For the conflict between the Dutch and the English law after the cession of New York to the English, see *Mortimer v. New York Elevated Railroad Co.* (1889), 6 N. Y. Supp. 898.

Upon the transfer of jurisdiction the new sovereign succeeds to all the rights of his predecessor, but he takes subject to the limitations of his own constitution. The ceding government cannot increase the powers of another government by purporting to convey to it powers which it cannot constitutionally exercise, *New Orleans v. United States* (1836), 10 Peters, 662; *Pollard v. Hagan* (1845), 3 Howard, 212. Any provision of the local law which is repugnant to the law of the new sovereignty may be nullified by the transfer of

jurisdiction. Hence on the cession of Minorca to Great Britain, it was held that torture, which was authorized by the old law, could not be inflicted by the British governor, *Fabrigas v. Mostyn* (1773), 20 State Trials, 181. The transfer may create a situation which necessarily renders certain laws inoperative. Thus on the cession of Texas to the United States, the incompetency of an American citizen to hold land in Texas because of alienage ceased to exist, *Osterman v. Baldwin* (1868), 6 Wallace, 116. The laws of the ceding state regulating the disposition of the public domain or the discharge of governmental functions in the ceded territory depart with the authority from which they emanated, *Harcourt v. Gaillard* (1827), 12 Wheaton, 523; *United States v. Vallejo* (1862), 1 Black, 541; *More v. Steinbach* (1888), 127 U. S. 70; *Ely's Administrator v. United States* (1898), 171 U. S. 220.

The transfer of jurisdiction does not in itself alter the local laws which are in force in the ceded territory except in so far as they are in conflict with the laws or institutions of the new sovereign, *Campbell v. Hall* (1774), Cowper, 204; *Picton's Case* (1804-1812), 30 State Trials, 226, 944; *Strother v. Lucas* (1838), 12 Peters, 410; *Leitensdorfer v. Webb* (1858), 20 Howard, 176; *Barnett v. Barnett* (1897), 9 New Mexico, 205, 211. On the whole subject see *Magoon, Reports*, 351; *Hyde*, I, 201; *Moore, Digest*, I, 304-311, 332-334.

SECTION 2. EFFECT ON PRIVATE PROPERTY.

THE UNITED STATES, Appellants, v. JUAN PERCHEMAN, Appellee.

SUPREME COURT OF THE UNITED STATES. 1833.
7 Peters, 51.

Appeal from the superior court for the eastern district of Florida.

On the 17th of September, 1830, Juan Percheman filed in the clerk's office of the superior court for the eastern district of Florida, a petition, setting forth his claim to a tract of land containing two thousand acres, within the district of East Florida. . . . The petitioner stated that he derived his title to the said tract of land under a grant made to him on the 12th day of December, 1815, by governor Estrada, then Spanish governor of East Florida, and whilst East Florida belonged to Spain. . . . The court . . . adjudged . . . "that the

grant is valid, . . . and . . . it is confirmed." The United States appealed to this court.

Mr. Chief Justice MARSHALL delivered the opinion of the court. . . .

Florida was a colony of Spain, the acquisition of which by the United States was extremely desirable. It was ceded by a treaty concluded between the two powers at Washington, on the 22d day of February, 1819.

The second article contains the cession, and enumerates its objects. The eighth contains stipulations respecting the titles to lands in the ceded territory.

It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country.) The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. The language of the second article conforms to this general principle. "His catholic majesty cedes to the United States in full property and sovereignty, all the territories which belong to him situated to the eastward of the Mississippi, by the name of East and West Florida." A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily

understood to pass the sovereignty only, and not to interfere with private property. If this could be doubted, the doubt would be removed by the particular enumeration which follows. "The adjacent islands dependent on said provinces, all public lots and squares, vacant land, public edifices, fortifications, barracks and other buildings which are not private property, archives and documents which relate directly to the property and sovereignty of the said provinces, are included in this article." . . .

This state of things ought to be kept in view when we construe the eighth article of the treaty, and the acts which have been passed by congress for the ascertainment and adjustment of titles acquired under the Spanish government. That article in the English part of it is in these words: "All the grants of land made before the 24th of January, 1818, by his catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the said grants would be valid if the territories had remained under the dominion of his catholic majesty."

This article is apparently introduced on the part of Spain, and must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. . . . Without it, the titles of individuals would remain as valid under the new government as they were under the old; and those titles, so far at least as they were consummate, might be asserted in the courts of the United States, independently of this article. . . .

The decree is affirmed.

ALVAREZ Y SANCHEZ v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1910.

216 U. S. 167.

Appeal from the Court of Claims.

[In 1878 the claimant Sanchez purchased for a valuable consideration the office known as "Numbered Procurador [Solicitor] of the Courts of First Instance of the capital of Porto Rico" in

perpetuity, and received from the Governor General of Porto Rico a patent which was confirmed in 1881 by a patent from the King of Spain. Porto Rico having been ceded to the United States, the American Military Governor on April 30, 1900, issued a decree abolishing the office of procurador. This decree was ratified by Congress. Sanchez then filed a complaint in the Court of Claims for the purpose of recovering from the United States the value of the office on the ground that its abolition deprived him of property contrary to article 7 of the treaty of peace between the United States and Spain which provided that the cession should not "in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds." The complaint was held bad on demurrer and the claimant appealed.]

MR. JUSTICE HARLAN delivered the opinion of the court. . . .

We do not think that the present claim is covered by the Treaty. . . . The words in the Treaty "property . . . of private individuals," evidently referred to ordinary, private property, of present, ascertainable value and capable of being transferred between man and man.

When the United States, in the progress of the war with Spain, took firm, military possession of Porto Rico, and the sovereignty of Spain over that Island and its inhabitants and their property was displaced, the United States, the new Sovereign, found that some persons claimed to have purchased, to hold in perpetuity, and to be entitled, without regard to the public will, to discharge the duties of certain offices or positions which were not strictly private positions in which the public had no interest. They were offices of a quasi-public nature, in that the incumbents were officers of court, and in a material sense connected with the administration of justice in tribunals created by government for the benefit of the public. It is inconceivable that the United States, when it agreed in the Treaty not to impair the property or rights of private individuals, intended to recognize, or to feel itself bound to recognize, the salability of such positions in perpetuity, or to so restrict its sovereign authority that it could not, consistently with the Treaty, abolish a system that was entirely foreign to the conceptions of the American people, and inconsistent with the spirit of our institutions. . . . If, originally, the claimant lawfully purchased, in perpetuity, the office of Solicitor (Procurador) and held it when

Porto Rico was acquired by the United States, he acquired and held it subject, necessarily, to the power of the United States to abolish it whenever it conceived that the public interest demanded that to be done. . . . It is clear that the claimant is not entitled to be compensated for his office by the United States because of its exercise of an authority unquestionably possessed by it as the lawful sovereign of the Island and its inhabitants. The abolition of the office was not, we think, in violation of any provision of the Constitution, nor did it infringe any right of property which the claimant could assert as against the United States. . . . The judgment of the Court of Claims must be affirmed. It is so ordered.

NOTE.—The rule that private property rights are not affected by a mere transfer of jurisdiction is operative without any treaty stipulation to that effect, *Leitensdorfer v. Webb* (1858), 20 Howard, 176; *United States v. Mereno* (1863), 1 Wallace, 400. A state which would violate such an elemental rule of justice would probably not feel bound by a treaty. No construction of a treaty which would impair those private property rights of its inhabitants recognized by the laws and usages of nations should be adopted further than its words require, *Strother v. Lucas* (1838) 12 Peters, 410.

While the rights of private property in ceded territory are not affected by the cession, the new sovereign may require the existence and extent of such rights to be proved in a prescribed manner, *De la Croix v. Chamberlain* (1827), 12 Wheaton, 599, 601; *United States v. Clarke* (1834), 8 Peters, 436; *Chouteau v. Eckhart* (1844), 2 Howard, 344, 374; *Glenn v. United States* (1852), 13 Howard, 250; *Tameling v. U. S. Freehold Co.* (1877), 93 U. S. 644, 661; *Botiller v. Dominguez* (1889), 130 U. S. 238; *Astiazaran v. Santa Rita Land and Mining Co.* (1893), 148 U. S. 80; *Ainsa v. New Mexico and Arizona Ry.* (1899), 175 U. S. 76; *Florida v. Furman* (1901), 180 U. S. 402; *Barker v. Harvey* (1901), 181 U. S. 481.

The question of the recognition by the receiving state of the private property rights of the inhabitants of ceded territory arises with great frequency in connection with grants which individuals claim to have been made to them by the ceding state. It is obvious that a sovereign can cede nothing with which he has already parted, *Mitchell v. United States* (1835), 9 Peters, 711, 733. The validity of a grant does not depend upon a strict compliance with every legal formality, *United States v. Augulsola* (1863), 1 Wallace, 352. If a grant is derived in regular form, a court will not inquire into its voidability for equitable considerations, *Jones v. McMasters* (1857), 20 Howard, 8. As to the treatment of inchoate grants, see *Soulard v. United States* (1830), 4 Peters, 511; *Delassus v. United States* (1835), 9 Peters, 117. As to conditional grants see *United States v. Arrendondo* (1832), 6 Peters 691; *Cessna v. United States* (1898), 169 U. S. 165. As to indefinite grants see *O'Hara v. United States* (1841), 15 Peters,

274; *United States v. Miranda* (1842), 16 Peters, 153; *Dent v. Emme* (1872), 14 Wallace, 308. As to void grants see *Harcourt v. Gaillard* (1827), 12 Wheaton, 523; *Coffee v. Groover* (1887), 123 U. S. 1; *More v. Steinbach* (1888), 127 U. S. 70. As to forfeited grants, see *United States v. Repentigny* (1866), 5 Wallace, 211. As to conflicting grants under former sovereigns, see *Doe v. Esclava* (1849), 9 Howard, 421.

The statement made in *Cessna v. United States* (1898), 169 U. S. 165, 186, that "it is the duty of a nation receiving a cession of territory to respect all rights of property as those rights were recognized by the nation making the cession," appears to be too broad, and in fact has not been followed by the Supreme Court in later cases. In 1728 the government of Spain had sold at public auction the office of high sheriff of Havana which was declared to be perpetual and hereditary and which carried with it a lucrative monopoly. Upon the American occupation of Cuba, the Military Governor, General Brooke, abolished the office and he was sustained by the Secretary of War, Mr. Root. When the claimant brought an action against the Military Governor, the Supreme Court decided against him and said, "We agree with the opinion of the Secretary of War, that the plaintiff had no property that survived the extinction of the sovereignty of Spain," *O'Reilly de Camara v. Brooke* (1908), 209 U. S. 45. In the case of *Alvarez Y. Sanchez v. United States* (1910), 216 U. S. 167, the court explicitly rejects the argument that since the office in question was regarded as property under Spanish law, it should be so regarded by the United States. Although the nations are in agreement as to most forms of property, certain exceptions are obvious. If Russia, while the institution of serfdom still existed, had ceded territory to Turkey, property rights in the serfs in the ceded territory would probably not have been disturbed, but if a similar cession had been made to Sweden, it is not to be supposed that such property rights would have survived. If a monopoly for the sale of liquor had been granted in one of the French West Indies, which monopoly had been declared to be perpetual and subject to inheritance and sale, the transfer of the island to the United States would nevertheless *ipso facto* extinguish the monopoly. In other words, the recognition of rights of property in ceded territory depends partly upon the nature of the property and the public policy of the receiving state.

For discussion of the effect on private rights of a transfer of jurisdiction see Bordwell, "Purchasable Offices in Ceded Territory", *Am. Jour. Int. Law*, III, 119 (an able adverse comment on *Alvarez Y. Sanchez v. United States* (1910), 216 U. S. 167); Sayre, "Change of Sovereignty and Private Ownership of Land," *Am Jour. Int. Law*, XII, 475 (an excellent treatment); Magoon, *Reports*, 177, 194, 305, 351, 374, 541, 650; Hyde, I, 235; Moore, *Digest*, I, 414.

CHAPTER IX.

THE PACIFIC RELATIONS OF STATES.

SECTION 1. DIPLOMATIC AND CONSULAR REPRESENTATIVES.

BARBUIT'S CASE.

COURT OF CHANCERY OF ENGLAND. 1737.

Williams, Cases in Equity during the Time of Lord Chancellor Talbot,
281.

Barbuit had a commission, as agent of commerce from the King of Prussia in Great Britain, in the year 1717, which was accepted here by the Lords Justices when the King was abroad. After the late King's demise his commission was not renewed until 1735 and then it was, and allowed in a proper manner; but with the recital of the powers given him in the commission, and allowing him as such. These commissions were directed generally to all the persons whom the same should concern and not to the King: and his business described in the commissions was, to do and execute what his Prussian Majesty should think fit to order with regard to his subjects trading in Great Britain; to present letters, memorials, and instruments concerning trade, to such persons, and at such places, as should be convenient, and to receive resolutions thereon; and thereby his Prussian Majesty required all persons to receive writings from his hands, and give him aid and assistance. Barbuit lived here near twenty years, and exercised the trade of a tallow-chandler, and claimed the privilege of an ambassador or foreign minister, to be free from arrests. After hearing counsel on this point,

LORD-CHANCELLOR [TALBOT. The first part of the opinion is quoted in *In re Republic of Bolivia Exploration Syndicate Limited*, [1914] 1 Ch. 139, *ante*, 221].

The question is, whether the defendant is such a person as 7 Anne, cap. 10, describes, which is only declaratory of the antient universal *jus gentium*; the words of the statute are *ambassadors or other public Ministers*, and the exception of

persons trading relates only to their servants; the parliament never imagining that the ministers themselves would trade. I do not think the words *ambassadors*, or *other public ministers*, are synonymous. I think that the word *ambassadors* in the act of parliament, was intended to signify ministers sent upon extraordinary occasions, which are commonly called *ambassadors extraordinary*; and *public ministers* in the act take in all others who constantly reside here; and both are intitled to these privileges. The question is, whether the defendant is within the latter words? It has been objected that he is not a public minister, because he brings no credentials to the King. Now although it be true that this is the most common form, yet it would be carrying it too far to say, that these credentials are absolutely necessary; because all nations have not the same forms of appointment. It has been said, that to make him a public minister he must be employed about state affairs. In which case, if state affairs are used in opposition to commerce, it is wrong: but if only to signify the business between nation and nation the proposition is right: for, trade is a matter of state, and of a public nature, and consequently a proper subject for the employment of an ambassador. In treaties of commerce those employed are as much public ministers as any others; and the reason for their protection holds as strong: and it is of no weight with me that the defendant was not to concern himself about other matters of state, if he was authorized as a public minister to transact matters of trade. It is not necessary that a minister's commission should be general to intitle him to protection; but it is enough that he is to transact any one particular thing in that capacity, as every ambassador extraordinary is; or to remove some particular difficulties, which might otherwise occasion war. But what creates my difficulty is, that I do not think he is intrusted to transact affairs between the two crowns: the commission is, to assist his Prussian Majesty's subjects here in their commerce; and so is the allowance. Now this gives him no authority to intermeddle with the affairs of the King: which makes his employment to be in the nature of a consul. And although he is called only an agent of commerce, I do not think the name alters the case. Indeed there are some circumstances that put him below a consul; for, he wants the power of judicature, which is commonly given to consuls. Also their commission is usually directed to the prince of the country; which is not the present case: but at most he is only a con-

sul.

It is the opinion of Barbeyrac, Winckefort and others, that a consul is not intitled to the *Jus Gentium* belonging to ambassadors.

And as there is no authority to consider the defendant in any other view than as a consul, unless I can be satisfied that those acting in that capacity are intitled to the *Jus Gentium*, I cannot discharge him. . . .

IN RE BAIZ, PETITIONER.

SUPREME COURT OF THE UNITED STATES. 1890.
135 U. S. 403.

[An action for libel having been instituted in the United States District Court against Jacob Baiz, the latter set up a plea to the jurisdiction on the ground that in the absence of the Minister of the Republic of Guatemala, he was the acting minister of Guatemala and hence not within the jurisdiction of the court. Mr. Baiz was a citizen of the United States, and since 1887 had been Consul General of Guatemala in New York. In 1889, the Minister of Guatemala informed the Secretary of State that he was obliged to return to his home for a short time and said: "Meanwhile I beg your Excellency to please allow that the Consul General of Guatemala and Honduras in New York, Mr. Jacob Baiz, should communicate to the office of the Secretary of State any matter whatever relating to the peace of Central America, that should without delay be presented to the knowledge of your Excellency." Accordingly the Secretary of State informed Mr. Baiz, "Consul General of Guatemala and Honduras," that he would "have pleasure in receiving any communication in relation to Central America, of which you may be made the channel, as intimated by Señor Lainfiesta." Upon the appointment of Mr. Blaine as Secretary of State official notice was sent to "Señor Don Jacob Baiz, in charge of the legations of Guatemala, Salvador, and Honduras," who acknowledged receipt of the notice in a communication signed "Jacob Baiz, Consul General." A month later, the Department of State addressed another communication to "Señor Don Jacob Baiz, in charge of the business of the legations of Guatemala,

Salvador and Honduras." In 1886 the Government of Honduras appointed Mr. Baiz to be its chargé d'affaires in the United States, but the Secretary of State declined to receive him in that capacity on the ground that it was contrary to American practice to recognize American citizens as the accredited diplomatic representatives of foreign powers. Later, when Mr. Baiz inquired whether he would be recognized as chargé d'affaires *ad hoc* or diplomatic agent of Honduras during the absence of the minister, the Secretary of State replied:

"It is not the purpose of the Department to regard the substitutionary agency, which it cheerfully admits in your case, as conferring upon you personally any diplomatic status whatever. Your agency is admitted to be such only as is compatible with the continued existence of a vacancy in the diplomatic representation of Honduras in the United States. To recognize you as chargé d'affaires *ad hoc* would be to announce that the vacancy no longer existed, and that diplomatic representation was renewed in your person. It is a common thing to resort to a temporary agency, such as yours, in the conduct of the business of a mission. A foreign minister, on quitting the country, often leaves the affairs of his office in the friendly charge of the minister of another country, but the latter does not thereby become the diplomatic agent of the government in whose behalf he exerts his good offices. The relation established is merely one of courtesy and comity. The same thing occurs when the temporary good offices of a consul are resorted to. In neither case is a formal credence, *ad hoc* or *ad interim*, necessary."

The District Court having denied the defendant's motion to dismiss the suit for lack of jurisdiction, he made application to the Supreme Court for a rule to show cause why a writ of prohibition should not issue to the judge of the District Court prohibiting him from proceeding further in such action, or, in the alternative, for a writ of mandamus commanding the judge to enter an order dismissing the cause for the reason that the Supreme Court possessed sole jurisdiction thereof. A rule having issued to show cause, the judge of the District Court transmitted the record and opinion in the case and submitted to the Supreme Court whether he should take further cognizance of the case or should dismiss it.]

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

. . .

Under section 2, Art. II, of the Constitution, the President is vested with power to "appoint ambassadors, other public ministers and consuls," and by section 3 it is provided that "he shall receive ambassadors and other public ministers."

These words are descriptive of a class existing by the law of nations, and apply to diplomatic agents whether accredited by the United States to a foreign power or by a foreign power to the United States. . . . These agents may be called ambassadors, envoys, ministers, commissioners, *chargés d'affaires*, agents, or otherwise, but they possess in substance the same functions, rights and privileges as agents of their respective governments for the transaction of its diplomatic business abroad. Their designations are chiefly significant in the relation of rank, precedence or dignity. 7 Opinions Atty. Gen. (Cushing), 186.

Hence, when in subdivision fifth of section 1674 of the Revised Statutes we find "diplomatic officer" defined as including "ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, *chargés d'affaires*, agents and secretaries of legation, and none others," we understand that to express the view of Congress as to what are included within the term "public ministers," although the section relates to diplomatic officers of the United States.

But the scope of the words "public ministers" is defined in the legislation embodied in Title XLVII., "Foreign Relations," Rev. Stat., 2d ed. 783. Section 4062 provides that "every person who violates any safe conduct or passport duly obtained and issued under authority of the United States; or who assaults, strikes, wounds, imprisons or in any other manner offers violence to the person of a public minister, in violation of the law of nations, shall be imprisoned for not more than three years, and fined, at the discretion of the court." Section 4063 enacts that whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized or attached, such writ or process shall be deemed void. Section 4064 imposes penalties for suing out any writ or process in violation of the preceding section; and section 4065 says that the two preceding sections shall not apply to any case where the person against whom the process

is issued is a citizen or inhabitant of the United States "in the service of a public minister," and process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a "domestic servant of a public minister," unless the name of the servant has been registered and posted as therein prescribed.

Section 4130, which is the last section of the title, is as follows: "The word 'minister,' when used in this title, shall be understood to mean the person invested with, and exercising, the principal diplomatic functions. The word 'consul' shall be understood to mean any person invested by the United States with, and exercising, the functions of consul general, vice-consul general, consul or vice-consul."

Sections 4062, 4063, 4064 and 4065 were originally sections 25, 26, 27 and 28 of the Crimes Act of April 30, 1790, c. 9, 1 Stat. 118; and these were drawn from the statute 7 Anne, c. 12, which was declaratory simply of the law of nations, which Lord Mansfield observed, in *Heathfield v. Chilton*, 4 Burr, 2015, 2016, the act did not intend to alter and could not alter.

In that case, involving the discharge of the defendant from custody, as a domestic servant to the minister of the Prince Bishop of Liège, Lord Mansfield said: "I should desire to know in what manner this minister was accredited—certainly, he is not an ambassador, which is the first rank—envoy, indeed, is a second class; but he is not shown to be even an envoy. He is called 'minister,' 't is true; but minister (alone) is an equivocal term." The statute of Anne was passed in consequence of the arrest of an ambassador of Peter the Great for debt, and the demand by the Czar that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death, 1 Bl. Com. 254; and it was in reference to this that Lord Ellenborough, in *Viveash v. Becker*, 3 M. & S. 284, where it was held that a resident merchant of London, who is appointed and acts as consul to a foreign prince, is not exempt from arrest on mesne process, remarked: "I cannot help thinking that the act of Parliament, which mentions only 'ambassadors and public ministers,' and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory, not only of what the law of nations is, but of the extent to which that law is to be carried."

Three cases are cited by counsel for petitioner arising under or involving the act of 1790. In *United States v. Liddle*, 2 Wash. C. C. 205, in the case of an indictment for an assault and battery on a member of a foreign legation, it was held that the certificate of the Secretary of State, dated subsequently to the assault and battery, is the best evidence to prove the diplomatic character of a person accredited as a minister by the government of the United States. The certificate from the Secretary of State, Mr. Madison, stated that "when Mr. Feronda produced to the President his credentials as *chargé des affaires* of Spain, he also introduced De Lima, as a gentleman attached to the legation and performing the duties of secretary of legation," and the certificate was held to be the best evidence to prove that Feronda was received and accredited, and that at the same time De Lima was presented and received as secretary attached to the legation. In *United States v. Ortega*, 4 Wash. C. C. 531, there was produced in court an official letter from the Spanish minister to the Secretary of State, informing him that he had appointed Mr. Salmon *chargé d'affaires*; a letter from the minister to Mr. Salmon; a letter from the Secretary of State addressed to the Spanish minister, recognizing the character of Mr. Salmon; two letters from the Secretary of State addressed to Mr. Salmon as *chargé d'affaires*; and the deposition of the chief clerk of the State Department that Mr. Salmon was recognized by the President as *chargé d'affaires*, and was accredited by the Secretary of State. In *United States v. Benner*, Baldwin, 234, the court was furnished with a certificate from the Secretary of State that the Danish minister had by letter informed the department that Mr. Brandis had arrived in this country in the character of *attaché* to the legation, and that said Brandis had accordingly, since that date, been recognized by the department as attached to the legation in that character.

These cases clearly indicate the nature of the evidence proper to establish whether a person is a public minister within the meaning of the Constitution and the laws, and that the inquiry before us may be answered by such evidence, if adduced.

Was Consul General Baiz a person "invested with and exercising the principal diplomatic functions," within section 4130, or a "diplomatic officer," within section 1674? His counsel claim in their motion that he was "the acting minister or *chargé d'affaires* of the Republics of Guatemala, Salvador and

Honduras in the United States," and so recognized by the State Department, and that he exercised diplomatic functions as such, and therefore was a public minister, within the statute.

By the Congresses of Vienna and Aix-la-Chapelle four distinct kinds of representation were recognized, of which the fourth comprised *chargés d'affaires*, who are appointed by the minister of foreign affairs, and not as the others, nominally or actually by the sovereign. Under the regulations of this Government the representatives of the United States have heretofore been ranked in three grades, the third being *chargés d'affaires*. Secretaries of legation act *ex officio* as *chargés d'affaires ad interim*, and in the absence of the secretary of legation the Secretary of State may designate any competent person to act *ad interim*, in which case he is specifically accredited by letter to the minister for foreign affairs.

Wheaton says: "*Chargés d'affaires*, accredited to the ministers of foreign affairs of the court at which they reside, are either *chargés d'affaires ad hoc*, who are originally sent and accredited by their governments, or *chargés d'affaires ad interim*, substituted in the place of the minister of their respective nations during his absence." *Elements Int. Law* (8th ed.), § 215.

Ch. de Martens explains that "*chargés d'affaires ad hoc* on permanent mission are accredited by letters transmitted to the minister of foreign affairs. *Chargés d'affaires ad interim* are presented as such by the minister of the first or second class when he is about to leave his position temporarily or permanently." *Guide Diplomatique*, Vol. I, p. 61, § 16.

"They," observes Twiss in his *Law of Nations*, § 192, "are orally invested with the charge of the embassy or legation by the ambassador or minister himself, to be exercised during his absence from the seat of his mission. They are accordingly announced in this character by him before his departure to the minister of foreign affairs of the court to which he is accredited."

Diplomatic duties are sometimes imposed upon consuls, but only in virtue of the right of a government to designate those who shall represent it in the conduct of international affairs, 1 Calvo, *Droit Int.* 586, 2d ed., Paris, 1870, and among the numerous authorities on international laws, cited and quoted from by petitioner's counsel, the attitude of consuls, on whom this func-

tion is occasionally conferred, is perhaps as well put by De Clercq and De Vallat as by any, as follows:

"There remains a last consideration to notice, that of a consul who is charged for the time being with the management of the affairs of the diplomatic post; he is accredited in this case in his diplomatic capacity, either by a letter of the minister of foreign affairs of France to the minister of foreign affairs of the country where he is about to reside, or by a letter of the diplomatic agent whose place he is about to fill, or finally by a personal presentation of this agent to the minister of foreign affairs of the country." *Guide Pratique des Consulats*, Vol. I., p. 93.

That it may sometimes happen that consuls are so charged is recognized by section 1738 of the Revised Statutes, which provides:

"No consular officer shall exercise diplomatic functions, or hold any diplomatic correspondence or relation on the part of the United States, in, with, or to the government, or country to which he is appointed, or any other country or government when there is in such country any officer of the United States authorized to perform diplomatic functions therein; nor in any case, unless expressly authorized by the President so to do."

But in such case their consular character is necessarily subordinated to their superior diplomatic character. "A consul," observed Mr. Justice Story, in *The Anne*, 3 Wheat. 435, 445, "though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it."

When a consul is appointed *chargé d'affaires*, he has a double political capacity; but though invested with full diplomatic privileges, he becomes so invested as *chargé d'affaires* and not as consul, and though authorized as consul to communicate directly with the government in which he resides, he does not

thereby obtain the diplomatic privileges of a minister. Atty. Gen. Cushing, 7 Opinions, 342, 345.

This is illustrated by the ruling of Mr. Secretary Blaine, April 12, 1881, that the Consul General of a foreign government was not to be regarded as entitled to the immunities accompanying the possession of diplomatic character, because he was also accredited as the "political agent" so-called of that government, since he was not recognized as performing any acts as such, which he was not equally competent to perform as Consul General. 1 Whart. Dig. Int. Law, 2d ed., c. 4, § 88, p. 624.

We are of opinion that Mr. Baiz was not, at the time of the commencement of the suit in question, *chargé d'affaires ad interim* of Guatemala, or invested with and exercising the principal diplomatic functions, or in any view a "diplomatic officer." He was not a public minister within the intent and meaning of § 687; and the District Court had jurisdiction.

The letter of Señor Lainfiesta of January 16, 1889, was neither an appointment of Mr. Baiz as *chargé d'affaires ad interim*, nor equivalent to such an appointment. It was a request in terms that the Secretary of State would "please allow that the Consul General of Guatemala and Honduras, in New York, Mr. Jacob Baiz," should communicate to the office of the Secretary of State any matters relating to the peace of Central America of which that department ought to be informed without delay. This is not the language of designation to a representative position, and is the language designating a mere medium of communication; and the reply of Mr. Secretary Bayard so treats it, in declaring that the department would be pleased to receive any communication in relation to Central America of which Consul General Baiz might be made the channel. This reply is addressed to Mr. Baiz as "Consul General of Guatemala and Honduras," and not as *chargé d'affaires ad interim*. . . .

The official circular issued by the Department of State, corrected to June 13, 1889, gives the names and description of the *chargés d'affaires ad interim*, in the case of countries represented by ministers who were absent and of countries having no minister, and the date of their presentation. In the instance of Portugal, the name is given of "Consul and acting Consul General, in charge of business of legation," and the fact of the presentation with the date appears in the list; while in the instance of Guatemala, Salvador and Honduras, the name of Mr.

Baiz is referred to in a footnote, with the title of Consul General only; nor does it appear, nor is it claimed to be the fact, that he was ever presented. As stated by counsel, Mr. Webster took the ground, in the case of M. Hülsemann, that as chargé d'affaires he was not, as matter of strict right, entitled to be presented to the President; and this is in accordance with the regulations of the State Department. Cons. Reg. 13. But such presentation is undeniably evidence of the possession of diplomatic character, and so would be the formal reception of a chargé d'affaires *ad interim* by the Secretary of State. The inference is obvious, that if the Department of State had regarded Mr. Baiz as chargé d'affaires *ad interim*, or as "invested with and exercising the principal diplomatic functions," his name would have been placed in the list, with some indication of the fact, as the title of chargé, or, if he had been presented, the date of his presentation. Nor can a reason be suggested why the petitioner has not produced in this case a certificate from the Secretary of State that he had been recognized by the Department of State as chargé d'affaires *ad interim* of Guatemala, or as intrusted with diplomatic functions, if there had been such recognition. A certificate of his status was requested by the Guatemalan minister, and if the State Department had understood that Mr. Baiz was in any sense or in any way a "diplomatic representative," no reason is perceived why the Department would not have furnished a certificate to that effect; but instead of that, it contented itself with a courteous reply, giving what was in its judgment a sufficient résumé of the facts, the letter being in effect a polite declination to give the particular certificate desired, because that could not properly be done.

Mr. Baiz was a citizen of the United States and a resident of the city of New York. In many countries it is a state maxim that one of its own subjects or citizens is not to be received as a foreign diplomatic agent, and a refusal to receive, based on that objection, is always regarded as reasonable. The expediency of avoiding a possible conflict between his privileges as such and his obligations as a subject or citizen, is considered reason enough in itself. Wheaton, 8th ed., § 210; 2 Twiss, Law of Nations, 276, § 186; 2 Phill. Int. Law, 171. Even an appointment as consul of a native of the place where consular service is required, is, according to Phillimore, "perhaps, rightfully pronounced, by a considerable authority, to be objectionable in prin-

ciple." Vol. II., p. 291, citing De Martens & De Cussey, *Recueil des Traités*, Index explicatif, p. xxx., tit. "Consuls."

"Other powers," says Calvo, vol. I., p. 559, 2d ed., "admit without difficulty their own citizens as representatives of foreign states, but imposing on them the obligation of amenability to the local laws as to their persons and property. These conditions, which, nevertheless, ought never to go so far as to modify or alter the representative character, ought always to be defined before or at the time of receiving the agent; for otherwise, the latter might find it impossible to claim the honors, rights and prerogatives attached to his employment." See also Heffter, 3d Fr. ed., 387.

In the United States, the rule is expressed by Mr. Secretary Evarts, under date of Sept. 19, 1879, thus: "This Government objects to receiving a citizen of the United States as a diplomatic representative of a foreign power. Such citizens, however, are frequently recognized as consular officers of other nations, and this policy is not known to have hitherto occasioned any inconvenience." And again, April 20, 1880, while waiving the obstacle in the particular instance, he says: "The usage of diplomatic intercourse between nations is averse to the acceptance, in the representative capacity, of a person who, while native born in the country which sends him, has yet acquired lawful status as a citizen by naturalization of the country to which he is sent." 1 Wharton Dig. Int. Law, 2d ed., § 88a, p. 628. Of course the objection would not exist to the same extent in the case of designation for special purposes or temporarily, but it is one purely for the receiving government to insist upon or waive at its pleasure. The presumption, therefore, would ordinarily be against Mr. Baiz's contention, and, as matter of fact, we find that when, in 1886, he was appointed chargé d'affaires of the Republic of Honduras to the Government of the United States, Mr. Secretary Bayard declined receiving him as the diplomatic representative of the government of that country, because of his being a citizen of the United States, and advised him that: "It has long been the almost uniform practice of this Government to decline to recognize American citizens as the accredited diplomatic representatives of foreign powers. The statutory and jurisdictional immunities and the customary privileges of right attaching to the office of a foreign minister make it not only inconsistent, but at times even inconvenient, that a citizen of this country should enjoy so anomalous a position."

And in a subsequent communication rendered necessary by a direct question of Mr. Baiz, the Secretary informs him "that it is not the purpose of the department to regard the substitutionary agency, which it cheerfully admits in your case, as conferring upon you personally any diplomatic status whatever." This correspondence disposes of the question before us.

Our conclusion is, as already stated, that the District Court had jurisdiction and we accordingly discharge the rule and

Deny the writs.

NOTE.—The employment of envoys is a feature of the earliest international relations, and the recognition of their inviolable character was one of the first rules of international law to be developed. King David made war upon the Ammonites because of the contempt with which his messengers were treated, and among the Greeks and Romans the same conception of the respect due to an envoy prevailed. Hyde, I, 746. It was not however until about the fifteenth century that permanent missions began to be established. Such missions were objects of suspicion in the countries of their sojourn, and not without reason, for they were usually centers of intrigue and conspiracy which often threatened even the life of the sovereign under whose protection they dwelt. The plots formed by the French and Spanish Ambassadors for the murder of Queen Elizabeth of England were not contrary to the customs of that time. The ambassadors who represented Germany and Austria-Hungary in the United States at the outbreak of the Great War reverted to the conception of diplomacy which prevailed in the Middle Ages and made their embassies the source of conspiracies which menaced the lives and property of American citizens. How radically the practice of diplomacy has changed in the last three centuries may be seen from the fact that it is now customary for a state to inquire as to the acceptability of the person whose appointment as a chief of mission it is contemplating, that every state expects its representatives to act in the most friendly manner toward the governments to which they are accredited, and that any diplomat whose conduct is offensive to such government subjects himself to recall or even to dismissal.

It sometimes happens that a state will receive for special purposes the agent of a government which it does not recognize. Thus Great Britain has entered into a trade agreement with the Soviet Government of Russia, but this is not such a recognition of that government as to entitle its agent in England to diplomatic immunity, *Fenton Textile Association v. Krassin* (1922), 38 T. L. R. 259.

As to diplomatic intercourse in general see Sir Ernest Satow, *A Guide to Diplomatic Practice*; Foster, *The Practice of Diplomacy*; Callières, *The Practice of Diplomacy*; Heatley, *Diplomacy and the Study of International Relations*; Hill, *History of Diplomacy in the International Development of Europe*; Moore, *Principles of American Diplomacy*; Bonfils (Fauchille), sec. 652. As to the grades of

diplomatic agents, see Hyde, I, 708; Cobbett, *Cases and Opinions*, I, 312; Moore, *Digest*, IV, 427. As to the beginning and termination of missions, see Hyde, I, 725; Moore, *Digest*, IV, 450. As to the forms of diplomatic intercourse, see Hyde, I, 776; Moore, *Digest*, IV, 680. As to the dismissal of ministers by the government to which they are accredited, see Hyde, I, 733; Moore, *Digest*, IV, 508. As to the functions of diplomatic agents, see Cobbett, *Cases and Opinions*, I, 315; Hyde, I, 739; Moore, *Digest*, IV, 680.

As to consuls see Stowell, *Le Consul and Consular Cases and Opinions*; Cobbett, *Cases and Opinions*, I, 321; Hyde, I, 785; Bonfils (Fauchille), sec. 733; Moore, *Digest*, V, chap. xvi. As to a consul's rights in connection with the estates of deceased countrymen, see Hyde, I, 809. As to a consul's duties in connection with shipping and seamen, see Hyde, I, 820.

SECTION 2. TREATIES AND CONVENTIONS.

HAVER v. YAKER.

SUPREME COURT OF THE UNITED STATES. 1869.
9 Wallace, 32.

Error to the Court of Appeals of Kentucky.

[Yaker, a Swiss by birth but a naturalized American, died intestate in Kentucky in 1853 seized of certain real estate there. He left a widow, who was a citizen of Kentucky, and certain heirs and next of kin who were citizens of Switzerland. By the laws of Kentucky as they stood in 1853, Yaker's heirs in Switzerland could not inherit the realty, the whole of which would go to the widow. In 1850, a treaty was signed by the United States and Switzerland by the terms of which the heirs claimed the realty. But the treaty had not been ratified and proclaimed until 1855, and the Court of Appeals of Kentucky held that it took effect only when ratified.]

Mr. Justice DAVIS delivered the opinion of the court.

It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date (Wheaton's International Law, by Dana, 336, bottom paging).

But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in *Arredondo's Case*, reported in 6th Peters, p. 749. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.

These views dispose of this case, and we are not required to determine whether this treaty, if it had become a law at an earlier date, would have secured the plaintiffs in error the interest which they claim in the real estate left by Yaker at his death.

Judgment affirmed.

CHARLTON v. KELLY, SHERIFF OF HUDSON COUNTY,
NEW JERSEY.

SUPREME COURT OF THE UNITED STATES. 1913.
229 U. S. 447.

Appeal from the Circuit Court of the United States for the District of New Jersey.

[Charlton, an American citizen, was arrested in New Jersey upon complaint of the Italian Vice-Consul, who charged him with the commission of a murder in Italy, and demanded his surrender in accordance with the terms of the extradition treaty

with the United States. The Penal Code of Italy forbade the surrender of Italian subjects for trial in another country for an offense committed in that country, but provided for their trial in Italy. Charlton contended that the obligations of an extradition treaty are reciprocal and hence that Italy's refusal to surrender her citizens for trial in the country in which their offenses were committed abrogated that clause in the treaty by which the United States agreed to surrender its citizens for trial for offenses committed in Italy.]

MR. JUSTICE LURTON . . . delivered the opinion of the court. . . .

We come now to the contention that by the refusal of Italy to deliver up fugitives of Italian nationality, the treaty has thereby ceased to be of obligation on the United States. The attitude of Italy is indicated by its Penal Code of 1900 which forbids the extradition of citizens, and by the denial in two or more instances to recognize this obligation of the treaty as extending to its citizens. . . .

The attitude of the Italian Government indicated by proffering this request for extradition "in accordance with Article V of the Treaty of 1868" is . . . substantially this,—

First. That crimes committed by an American in a foreign country were not justiciable in the United States, and must, therefore, go unpunished unless the accused be delivered to the country wherein the crime was committed for trial.

Second: Such was not the case with Italy, since under the laws of Italy, crimes committed by its subjects in foreign lands were justiciable in Italy.

Third: That as a consequence of the difference in the municipal law, "it was logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the Convention itself, be guided by the spirit of its own legislation."

This adherence to a view of the obligation of the treaty as not requiring one country to surrender its nationals while it did the other, presented a situation in which the United States might do either of two things, namely: abandon its own interpretation of the word persons as including citizens, or adhere to its own interpretation and surrender the appellant, although the obligation had, as to nationals, ceased to be reciprocal. The United States could not yield its own interpretation of the

treaty, since that would have had the most serious consequence on five other treaties in which the word "persons" had been used in its ordinary meaning, as including *all persons*, and, therefore, not exempting citizens. If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. 7 Kent's Comm., p. 175.

Upon this subject Vattel, page 452, says:

"When the treaty of peace is violated by one of the contracting parties, the other has the option of either declaring the treaty null and void, or allowing it still to subsist; for a contract which contains reciprocal engagements, cannot be binding on him with respect to the party who on his side pays no regard to the same contract. But, if he chooses not to come to a rupture, the treaty remains valid and obligatory."

Grotius says (book 3, ch. 20, par. 38):

"It is honourable, and laudable to maintain a peace even after it has been violated by the other parties: as Scipio did, after the many treacherous acts of the Carthaginians. For no one can release himself from an obligation by acting contrary to his engagements. And though it may be further said that the peace is broken by such an act, yet the breach ought to be taken in favour of the innocent party, if he thinks proper to avail himself of it."

In Moore's International Law Digest. Vol. 5, page 566, it is said:

"A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do."

In the case of *In re Thomas*, 12 Blatchf. 370, Mr. Justice Blatchford (then District Judge) said:

"Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the

action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture."

In the case of *Terlinden v. Ames*, 184 U. S. 270, 287, the question was presented whether a treaty was a legal obligation if the state with whom it was made was without power to carry out its obligation. This court quoted with approval the language of Justice Blatchford, set out above, and said (p. 285):

"And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance."

That the political branch of the Government recognizes the treaty obligation as still existing is evidenced by its action in this case. In the memorandum giving the reasons of the Department of State for determining to surrender the appellant, after stating the difference between the two governments as to the interpretation of this clause of the treaty, Mr. Secretary Knox said:

"The question is now for the first time presented as to whether or not the United States is under obligation under treaty to surrender to Italy for trial and punishment citizens of the United States fugitive from the justice of Italy, notwithstanding the interpretation placed upon the treaty by Italy with reference to Italian subjects. In this connection it should be observed that the United States, although, as stated above, consistently contending that the Italian interpretation was not the proper one, has not treated the Italian practice as a breach of the treaty obligation necessarily requiring abrogation, has not abrogated the treaty or taken any step looking thereto, and has, on the contrary, constantly regarded the treaty as in full force and effect and has answered the obligations imposed thereby and has invoked the rights therein granted. It should, moreover, be observed that even though the action of the Italian Government be regarded as a breach of the treaty, the treaty is

binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us.

"The question would, therefore, appear to reduce itself to one of interpretation of the meaning of the treaty, the Government of the United States being now for the first time called upon to declare whether it regards the treaty as obliging it to surrender its citizens to Italy, notwithstanding Italy has not and insists it can not surrender its citizens to us. It should be observed, in the first place, that we have always insisted not only with reference to the Italian extradition treaty, but with reference to the other extradition treaties similarly phrased that the word 'persons' includes citizens. We are, therefore, committed to that interpretation. The fact that we have for reasons already given ceased generally to make requisition upon the Government of Italy for the surrender of Italian subjects under the treaty, would not require of necessity that we should, as a matter of logic or law, regard ourselves as free from the obligation of surrendering our citizens, we laboring under no such legal inhibition regarding surrender as operates against the government of Italy. Therefore, since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy even though Italy should not, by reason of the provisions of her municipal law be able to surrender its citizens to us."

The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.

Judgment affirmed.

NOTE.—The effect which will be given to a treaty by its signatories is a question of constitutional rather than of international law. In its nature a treaty is a contract between nations and not a measure of legislation. It is a promise rather than a completed act and merely indicates what the parties to it have bound themselves to do. In Great Britain, for instance, a treaty is recognized as an engagement binding in honor upon the government, but the courts cannot enforce it nor protect any rights derived from it until authorized to do so by an act of Parliament, *Walker v. Baird* (1892), L. R. [1892] A. C. 691; *The Barenfels* (1915), 1 Br. & Col. P. C. 122, 128. If a treaty conflicts with an act of Parliament the statute always prevails, *In re California Fig Syrup Co.'s Trade-mark* (1885), 40 Ch. D. 620, 627-8. In America treaties occupy a wholly exceptional position. They are

declared by the Constitution to be a part of the supreme law of the land, and unless by their terms they contemplate further legislative or executive action, they may create rights which a court of competent jurisdiction is under obligation to enforce, *Foster and Elam v. Neilson* (1829), 2 Peters, 253. Whether or not the agent of the foreign government who made the treaty on its behalf was duly authorized is a political question of which the courts will not take jurisdiction, *Doe v. Braden* (1854), 16 Howard, 635. In case of conflict between a treaty and an act of Congress, the one later in time prevails, *Head Money Cases* (1884), 112 U. S. 580. Should Congress enact a law which operated as a repeal of an existing treaty its action would be binding upon the courts, but the responsibility of the United States to the other party to the treaty would not be affected thereby, *Rainey v. United States* (1914), 232 U. S. 310. In case of conflict between a treaty and the constitution or statute of a State, the treaty prevails, *Ware v. Hylton* (1796), 3 Dallas, 199; *Chirac v. Chirac* (1817), 2 Wheaton, 259; *Hauenstein v. Lynham* (1879), 100 U. S. 483; *People v. Gerke* (1855), 5 Cal. 381; *Techt v. Hughes* (1920), 229 N. Y. 222. That the United States may regulate by treaty subjects which it may not regulate by legislation see *Missouri v. Holland* (1920), 252 U. S. 416.

For executive agreements or compacts other than treaties see *Field v. Clark* (1892), 143 U. S. 649; *Altman v. United States* (1912), 224 U. S. 583. The important agreement between Great Britain and the United States for the limitation of naval forces on the Great Lakes was arrived at by an exchange of notes and was never embodied in any formal instrument, *Moore, Digest*, V. 204. Horse Shoe Reef in Lake Erie was ceded to the United States by Great Britain by a protocol signed in London by Lord Palmerston and the American Minister and never submitted to the Senate, *Moore, Digest*, V. 215. A temporary situation is frequently regulated by a *modus vivendi* which is purely an executive agreement. While the President is morally if not legally bound by an agreement to which he is a party, question has been raised as to the binding effect of his personal engagements upon his successors. See Baldwin, "The Exchange of Notes in 1908 between Japan and the United States," *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, III, 456. The subject is well treated in Hyde, II, 27.

Many countries, like the United States, require treaties to receive some form of ratification. In the absence of any provision to the contrary in the treaty itself, a treaty takes effect as to private rights upon the exchange of ratifications, *United States v. Arredondo* (1832), 6 Peters, 691, but as to public rights it may operate retrospectively as from the date of signature, *Davis v. Police Jury of Concordia* (1850), 9 Howard, 280. Treaties made by members of the League of Nations do not become binding until registered with the Secretariat of the League.

On the construction of treaties see *Marryatt v. Wilson* (1799), 1 Bosan. & Puller, 430; *The Amistad* (1841), 15 Peters, 518; *Geofroy v. Riggs* (1890), 133 U. S. 258; *Sullivan v. Kidd* (1921), 245 U. S.

433. On the construction of the most-favored-nation clause, which is so commonly found in treaties of commerce, see Crandall, ch. xxiv; Herod, *Favored Nation Treatment*; Hyde, II, 73; United States Tariff Commission, *Reciprocity and Commercial Treaties*; Visser, "La Clause de la Nation la plus Favorisée," *Revue de Droit International*, IV (2nd series), 66, 159, 270; Sir Thomas Barclay, "The Effect of the Most-Favoured-Nation Clause in Treaties", *Yale Law Journal*, XVII, 26; Hornbeck, "The Most-Favored-Nation Clause", *Am. Jour. Int. Law*, III, 395, 619, 797; *Bartram v. Robertson* (1887), 122 U. S. 116; *Whitney v. Robertson* (1888), 124 U. S. 190; *Taylor v. Morton* (1855), 2 Curtis, 454.

On the general subject of treaties see Butler, *The Treaty-Making Power of the United States*; Crandall, *Treaties: Their Making and Enforcement*; Roxburgh, *International Conventions and Third States*; Cobbett, *Cases and Opinions*, I, 327; Hyde, II, 1; Bonfils (Fauchille), sec. 818; and Moore, *Digest*, V. ch. xvii.

SECTION 3. EXTRADITION.

UNITED STATES v. RAUSCHER.

SUPREME COURT OF THE UNITED STATES. 1886.
119 U. S. 407.

Certificate of division of opinion from the Circuit Court of the United States for the Southern District of New York.

[Rauscher, being charged with murder on board an American vessel on the high seas, fled to England, whence he was extradited in accordance with the treaty of 1842. The Circuit Court in which he was tried did not proceed against him for murder, but for a lesser offence not named in the treaty. The judges being divided in opinion as to whether this could be done, the question was certified to the Supreme Court.]

MR. JUSTICE MILLER delivered the opinion of the court. . . .

The treaty with Great Britain, under which the defendant was surrendered by that government to ours upon a charge of murder, is that of August 9, 1842, styled "A treaty to settle and define the boundaries between the territories of the United States and the possessions of Her Britannic Majesty in North America; for the final suppression of the African slave trade; and for the giving up of criminals, fugitives from justice, in certain cases." 8 Stat. 576.

With the exception of this caption, the tenth article of the

treaty contains all that relates to the subject of extradition of criminals. That article is here copied, as follows:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive." . . .

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law. . . .

With nearly all the nations of the world with whom our relations are such that fugitives from justice may be found within their dominions or within ours, we have treaties which govern the

rights and conduct of the parties in such cases. These treaties are also supplemented by acts of Congress, and both are in their nature exclusive.

The case we have under consideration arises under one of these treaties made between the United States and Great Britain, the country with which, on account of our intimate relations, the cases requiring extradition are likely to be most numerous. . . .

The treaty itself, in reference to the very matter suggested in the question certified by the judges of the Circuit Court, has been made the subject of diplomatic negotiation between the Executive Department of this country and the government of Great Britain in the cases of Winslow and Lawrence. Winslow, who was charged with forgery in the United States, had taken refuge in England, and, on demand being made for his extradition, the Foreign Office of that country required a preliminary pledge from our government that it would not try him for any other offense than the forgery for which he was demanded. To this Mr. Fish, the Secretary of State, did not accede, and was informed that the reason of the demand on the part of the British government was that one Lawrence, not long previously extradited under the same treaty, had been prosecuted in the courts of this country for a different offence from that for which he had been demanded from Great Britain, and for the trial of which he was delivered up by that government. Mr. Fish defended the right of the government or state in which the offence was committed to try a person extradited under this treaty for any other criminal offence, as well as for the one for which the extradition had been demanded; while Lord Derby, at the head of the Foreign Office in England, construed the treaty as requiring the government which had demanded the extradition of an offender against its laws for a prescribed offence, mentioned in the treaty and in the demand for his extradition, to try him for that offence and for no other. The correspondence is an able one upon both sides, and presents the question which we are now required to decide, as to the construction of the treaty and the effect of the acts of Congress already cited, and of a statute of Great Britain of 1870 on the same subject. The negotiations between the two governments, however, on that subject were inconclusive in any other sense than that Winslow was not delivered up and Lawrence was never actually brought

to judgment for any other offence than that for which his extradition was demanded. . . .

Turning to seek in judicial decisions for authority upon the subject, as might be anticipated we meet with nothing in the English courts of much value, for the reason that treaties made by the Crown of Great Britain with other nations are not in those courts considered as part of the law of the land, but the rights and the duties growing out of those treaties are looked upon in that country as matters confided wholly for their execution and enforcement to the executive branch of the government. Speaking of the Ashburton treaty of 1842, which we are now construing, Mr. Clarke says, that, "in England the common law being held not to permit the surrender of a criminal, this provision could not come into effect without an Act of Parliament, but in the United States a treaty is as binding as an Act of Congress." Clarke on Extradition, 38. . . .

The treaty of 1842 being, therefore, the supreme law of the land, which the courts are bound to take judicial notice of, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty, we proceed to inquire, in the first place, so far as pertinent to the questions certified by the circuit judges, into the true construction of the treaty. We have already seen that, according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offence than that for which he had been delivered up. This is a principle which commends itself as an appropriate adjunct to the discretionary exercise of the power of rendition, because it can hardly be supposed that a government which was under no treaty obligation nor any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offence of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party. In exercising its discretion, it might be very willing to deliver up offenders against such laws as were essential to the protection of life, liberty, and person, while it would not be willing to do this on account of minor misdemeanors or

of a certain class of political offences in which it would have no interest or sympathy. Accordingly, it has been the policy of all governments to grant an asylum to persons who have fled from their homes on account of political disturbances, and who might be there amenable to laws framed with regard to such subjects, and to the personal allegiance of the party. In many of the treaties of extradition between the civilized nations of the world, there is an express exclusion of the right to demand the extradition of offenders against such laws, and in none of them is this class of offences mentioned as being the foundation of extradition proceedings. Indeed, the enumeration of offences in most of these treaties, and especially in the treaty now under consideration, is so specific, and marked by such a clear line in regard to the magnitude and importance of those offences, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others.

It is, therefore, very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offences enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject. It is unreasonable to suppose that any demand for rendition framed upon a general representation to the government of the asylum, (if we may use such an expression,) that the party for whom the demand was made was guilty of some violation of the laws of the country which demanded him, without specifying any particular offence with which he was charged, and even without specifying an offence mentioned in the treaty, would receive any serious attention; and yet such is the effect of the construction that the party is properly liable to trial for any other offence than that for which he was demanded, and which is described in the treaty. There would, under that view of the subject, seem to be no need of a description of a specific offence in making the demand. But, so far from this being admissible, the treaty not only provides that the party shall be charged with one of the crimes mentioned, to wit, murder, assault with intent to commit murder, piracy, arson, robbery, forgery or the utterance

of forged paper, but that evidence shall be produced to the judge or magistrate of the country of which such demand is made, of the commission of such an offence, and that this evidence shall be such as according to the law of that country would justify the apprehension and commitment for trial of the person so charged. If the proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offence is charged to have been committed, there is very little use for this particularity in charging a specific offence, requiring that offence to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt to put him upon trial for it. Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its provisions are obligatory alone on the State which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offence, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and all the rights which the law governing that proceeding was intended to secure.

If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them. . . .

IN RE CASTIONI.

QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE OF ENGLAND.
1890.

Law Reports [1891] 1 Q. B. 149.

[The prisoner, Castioni, a citizen of the canton of Ticino, Switzerland, together with a number of other citizens of Bellinzona, seized the arsenal in that town, from which they took arms and ammunition, disarmed the gendarmes, and thence marched upon the municipal palace. Admission having been refused, the crowd forced an entrance, and in the course of the attack, Rossi, a member of the government who was in the palace, was shot and killed by Castioni. There was no evidence that Rossi was known to Castioni. After obtaining possession of the palace, the crowd organized a provisional government which remained in control until overthrown by the troops of the Swiss Republic. Castioni fled to England where he was arrested on the requisition of the Swiss Government, and his extradition demanded on a charge of murder. On an application for a writ of habeas corpus, Castioni argued that his offense was of a political character, and hence was not extraditable within the meaning of the Extradition Act of 1870 and the treaty of extradition between Great Britain and Switzerland, which provided in identical words: "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character."]

DENMAN, J. . . . There has been no legal decision as yet upon the meaning of the words contained in the Act of 1870, upon the true meaning of which this case mainly depends. . . . I do not think it is necessary or desirable that we should attempt to put into language, in the shape of an exhaustive definition, exactly the whole state of things, or every state of things which might bring a particular case within the description of an offence of a political character. I wish, however, to express an opinion as to one matter upon which I entertain a very strong opinion. That is, that if the description given by Mr. John Stuart Mill, ["Any offence committed in the course of or furthering of civil war, insurrection, or political commotion,"] were to be construed in the sense that it really means any act which takes place in the course of a political rising

without reference to the object and intention of it, and other circumstances connected with it, I should say that it was a wrong definition and one which could not be legally applied to the words in the Act of Parliament. Sir Charles Russell suggested that "in the course of" was to be read with the words following, "or in furtherance of," and that "in furtherance of" is equivalent to "in the course of." I cannot quite think that this was the intention of the speaker, or is the natural meaning of the expression; but I entirely concur with the observation of the Solicitor-General that in the other sense of the words, if they are not to be construed as merely equivalent expressions, it would be a wrong definition. I think that in order to bring the case within the words of the Act and to exclude extradition for such an act as murder, which is one of the extradition offences, it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands, before it can be brought within the meaning of the words used in the Act. . . .

It seems to me that it is a question of mixed law and fact—mainly indeed of fact—as to whether the facts are such as to bring the case within the restriction of s. 3, and to show that it was an offence of a political character. I do not think it is disputed, or that now it can be looked upon as in controversy, that there was at this time existing in Ticino a state of things which would certainly show that there was more than a mere small rising of a few people against the law of the State. I think it is clearly made out by the facts of this case, that there was something of a very serious character going on—amounting, I should go so far as to say, in that small community, to a state of war. There was an armed body of men who had seized arms from the arsenal of the State; they were rushing into the municipal council chamber in which the Government of the State used to assemble; they demanded admission; admission was refused; some firing took place; the outer gate was broken down; and I think it also appears perfectly plain from the evidence in the case that Castioni was a person who had been taking part in that movement at a much earlier stage. He was an active party in the movement; he had taken part in the binding of one member of the Government. Some time before he arrived with his pistol in his hand at the seat of government, he had gone

with multitudes of men, armed with arms from the arsenal, in order to attack the seat of government, and I think it must be taken that it is quite clear that from the very first, he was an active party, one of the rebellious party who was acting and in the attack against the Government. . . . At the moment at which Castioni fired the shot, the reasonable presumption is, not that it is a matter of absolute certainty (we cannot be absolutely certain about anything as to men's motives), but the reasonable assumption is that he, at the moment knowing nothing about Rossi, having no spite or ill-will against Rossi, as far as we know, fired that shot—that he fired it thinking it would advance and that it was an act which was in furtherance of, and done intending it to be in furtherance of, the very object which the rising had taken place in order to promote, and to get rid of the Government, who, he might, until he had absolutely got into the place, have supposed were resisting the entrance of the people to that place. . . . There is evidence that there was great confusion; there is evidence of shots fired after the shot which Castioni fired; and all I can say is, that looking at it as a question of fact, I have come to the conclusion that at the time at which that shot was fired he acted in the furtherance of the unlawful rising to which at that time he was a party, and an active party—a person who had been doing active work from a very much earlier period, and in which he was still actively engaged. That being so, I think the writ ought to issue, and that we should be acting contrary to the spirit of this enactment, and to the fair meaning of it, if we were to allow him to be detained in custody longer.

HAWKINS, J. I am of the same opinion. . . . Now what is the meaning of crime of a political character? I have thought over this matter very much indeed, and I have thought whether any definition can be given of the political character of the crime—I mean to say, in language which is satisfactory. I have found none at all, and I can imagine for myself none so satisfactory, and to my mind so complete, as that which I find in a work which I have now before me, and the language of which for the purpose of my present judgment I entirely adopt, and that is the expression of my brother Stephen in his *History of the Criminal Law of England* in vol. ii., pp. 70, 71. I will not do more than refer to the interpretations, other than those with which he agrees, which have been given upon this expression, "political character"; but I adopt his definition absolutely.

"The third meaning which may be given to the words, and which I take to be the true meaning, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle, &c., by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances. I do not wish to enter into details beforehand on a subject which might at any moment come under judicial consideration." The question has come under judicial consideration, and having had the opportunity before this case arose of carefully reading and considering the views of my learned brother, having heard all that can be said upon the subject, I adopt his language as the definition that I think is the most perfect to be found or capable of being given as to what is the meaning of the phrase which is made use of in the Extradition Act.

Now, was this act done by Castioni of a political character? . . . I find no evidence which satisfies me that his object in firing at Rossi was to take that poor man's life, or to pay off any old grudge which he had against him, or to revenge himself for anything in the least degree which Rossi or any one of the community had ever personally done to him. When it is said that he took aim at Rossi, there is not a particle of evidence that Rossi was even known to him by name. I cannot help thinking that everybody knows there are many acts of a political character done without reason, done against all reason; but at the same time, one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all

reason, by those who can calmly reflect upon it after the battle is over.

For the reasons I have expressed, I am of opinion that . . . the prisoner ought to be discharged.

[STEPHEN, J., delivered a concurring opinion.]

NOTE.—The earliest extradition treaties were generally made for the purpose of securing the return of political offenders to the jurisdiction of the sovereign whom they had offended, Clarke, *The Law of Extradition*, 18, but with the growth of popular government sentiment has so changed that political offenders are now usually not extraditable. The chief difficulty now arises in connection with the determination of what is a political offense, for while the term is found in many treaties there is no agreement as to its meaning. See *In re Meunier*, [1894] 2 Q. B. 415; *In re Ezeta* (1894), 62 Fed. 972; *Ornelas v. Ruiz* (1896), 161 U. S. 502; *In re Fedorenko* (1910), 20 Manitoba, 221; Oppenheim, I, sec. 133; Piggott, *Extradition*, 42; Moore, *Extradition*, I, 303; J. Arthur Barrett, "Extradition Treaties," in *25th Report of International Law Association*, (1908), 101; the papers by J. Reuben Clark, Jr., Frederick R. Coudert, and Judge Julian W. Mack on "The Nature and Definition of Political Offense in International Extradition," in *Proceedings of the American Society of International Law*, 1909, 95-165; Bonfils (Fauchille), sec. 466; Hyde, I, 571; Moore, *Digest*, IV, 332.

While the surrender of a fugitive charged with crime may not be demanded as a matter of right under international law, the ease with which individuals can now pass from one jurisdiction to another necessitates some provision for the extradition of such persons. It is probable that the surrender of fugitive criminals will before many years be recognized as a duty on the part of the states where they seek refuge, for the basis of extradition is the common interest of all nations in the prevention and punishment of crime. At present, however, extradition can be demanded only because of legislation or treaty stipulations. The first extradition statute in the United States was enacted in 1848, while it was not until 1870 that the British Parliament passed an extradition act. Extradition treaties have rapidly increased both in the number negotiated and in the number of offenses which they cover. The first extradition agreement between England and America was embodied in article 27 of the Jay Treaty of 1794 and covered only two offenses. The present extradition treaties between the two countries, negotiated in 1842, 1890, 1899 and 1907 apply to more than thirty offenses. The extradition treaty between Brazil and Uruguay which became effective January 15, 1919 permits the extradition under certain restrictions of persons accused of any crime "of an ordinary nature." So general a provision goes far towards recognizing extradition to be an international duty. A country whose municipal law does not prevent may either surrender or expel one charged with an offense that is not extraditable. As to the power to do this in the United States, see the discussion concerning the case of Arguelles, Wheaton (Dana), sec. 115, note 73;

Moore, *Extradition*, I, 33. It is a general principle of international law that the act for which extradition is demanded must be criminal under the law of both countries, *Wright v. Henkel* (1903), 190 U. S. 40. A fugitive from the United States who is brought back by force or fraud from the country in which he has taken refuge can not claim exemption from trial in the jurisdiction where his offense was committed, *Ker v. Illinois* (1886), 119 U. S. 436. A person extradited under the treaty of 1899 with Great Britain cannot be imprisoned for an offense other than that for which he was extradited even though he had been convicted and sentenced prior to his extradition, *Johnson v. Browne* (1907), 205 U. S. 309. The meaning of the term describing an offense in a treaty will be determined by the law of the country where the offense was committed, *Benson v. McMahon* (1880), 127 U. S. 457, but the sufficiency of the evidence offered for the commitment of the fugitive will be determined by the law of the place where he is found, *Pettit v. Walshe* (1904), 194 U. S. 205. As to what evidence is necessary see *Yordi v. Nolte* (1909), 215 U. S. 227; *In re Ezeta* (1894), 62 Fed. 972. If an offender who has been extradited later commits another offense in the country to which he has been surrendered, he may be tried for the second offense before being tried for the offense for which he was extradited, *Collins v. O'Neil* (1909), 214 U. S. 113. An offender who has been extradited and released on bail pending trial and who goes out of the country and returns voluntarily before the time set for the trial cannot be arrested for another non-extraditable offense until the first one has been disposed of, *Cosgrove v. Winney* (1899), 174 U. S. 64. For an instance of surrender under very unusual circumstances see *The Case of Savarkar* (1911), *Wilson, The Hague Arbitration Cases*, 230, and *Scott, The Hague Court Reports*, 275. The surrender of fugitives by one State of the American Union upon the demand of another, commonly called extradition, may be more appropriately termed rendition. See Moore, *Extradition and Interstate Rendition*. The rule of international law that an offender may be tried only for the offense for which he was extradited does not apply to rendition between the States of the American Union, *Lascelles v. Georgia* (1893), 148 U. S. 537.

Various considerations which enter into the application and interpretation of extradition treaties, particularly in the United States, were thus discussed in *Grin v. Shine* (1902), 187 U. S. 181, 184:

Good faith toward foreign powers with which we have entered into treaties of extradition does not require us to surrender persons charged with crime in violation of those well-settled principles of criminal procedure which from time immemorial have characterized Anglo-Saxon jurisprudence. Persons charged with crime in foreign countries, who have taken refuge here, are entitled to the same defenses as others accused of crime within our own jurisdiction. We are not prepared, however, to yield our assent to the suggestion that treaties of extradition are invasions of the right of political habitation within our territory, or that every intendment in

proceedings to carry out these treaties shall be in favor of the party accused. Such treaties are rather the exceptions to the general right of political asylum, and an extension of our immigration laws prohibiting the introduction of persons convicted of crimes, 18 Stat. 477, by providing for their deporation and return to their own country, even before conviction, when their surrender is demanded in the interests of public justice. There is such a general acknowledgement of the necessity of such treaties that of late, and since the facilities for the escape of criminals have so greatly increased, most civilized powers have entered into conventions for the mutual surrender of persons charged with the most serious non-political crimes. These treaties should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused.

On extradition in general see Struycken, "Des Droits de l'Individu en Matière d'Extradition," in *27th Report of International Law Association* (1912), 139; Clarke, *Extradition*; Piggott, *Extradition* (chiefly a commentary on the British Extradition Act of 1870); Bentwich, *Leading Cases and Statutes on International Law*, 90 (convenient summary of the British Extradition Act); Moore, *Extradition and Interstate Rendition*; Bevilacqua, *Diretto Pubblico Internacional*, II, 123; Cobbett, *Cases and Opinions*, I, 244; Hyde, I, 566; Bonfils (Fauchille), sec. 455; Moore, *Digest*, IV, ch. xiv.

CHAPTER X.

THE NON-BELLIGERENT SETTLEMENT OF INTERNATIONAL CONTROVERSIES.

SECTION 1. ARBITRATION.

THE LA NINFA.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT. 1896.
75 Fed. Rep. 513.

Appeal from the District Court of the United States for the District of Alaska.

HAWLEY, District Judge. This is an appeal in admiralty from a decree . . . forfeiting the schooner La Ninfa, upon the ground that she had been unlawfully engaged in killing seal in the waters of Alaska territory. See 49 Fed. 575. The libel charges that the vessel and her crew "were engaged in killing fur seals within the limits of Alaska territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States." . . . There is no evidence that a single seal had been killed within one marine league of Alaska, whether of the mainland or any of its islands. The evidence does show that the killing of the seals was about 10 miles from shore.

The question arises whether Behring Sea, at a distance of more than one league from the American shore, is Alaskan territory, or in the waters thereof, or within the dominion of the United States in the waters of Behring Sea. Section 1956 of the Revised Statutes reads as follows:

"Sec. 1956. No person shall kill any otter, mink, marten or fur-seal, or other fur-bearing animal, within the limits of Alaska territory, or in the waters thereof; . . . and all vessels, their tackle, apparel, furniture and cargo, found engaged in violation of this section shall be forfeited," etc.

Section 3 of the act to provide for the protection of the salmon

fisheries of Alaska, approved March 2, 1889, provides that section 1956 "is hereby declared to include and apply to all the dominion of the United States in the waters of Behring Sea; and it shall be the duty of the President, at a timely season in each year, to issue his proclamation and cause the same to be published . . . warning all persons against entering said waters for the purpose of violating the provisions of said section," etc. By these provisions, the question as to what the boundaries were over which the United States had dominion was not intended to be, and was not, determined by the amendatory act. The question was left open for future consideration. . . .

The government relies solely upon the provisions of the statute to sustain the decree of the district court, and contends that the decision of the Supreme Court in *Re Cooper*, 143 U. S. 474, 12 Sup. Ct. 453, justifies the affirmance of the decree. That decision does not reach the direct point here in controversy. The court there held that the question was a political one, in which the United States had asserted a doctrine in opposition to the views contended for by the petitioner; that the negotiations were then pending in relation to the particular subject; but the court declined to decide whether the government was right or wrong in its contention, or to review the action of the political departments upon the question under review. The opinion shows that the court considered it a grave question. It recites much of the important history relative to the disputed question, but the question itself was not decided. The case was disposed of upon other grounds. What was said concerning the disputed questions had reference to the conditions then existing. The conditions now existing are entirely different. The negotiations then pending [between the United States and Great Britain] were brought about by the asserted claim of the United States to proprietary rights in the waters of Behring Sea, and in the fur-bearing animals which frequent it and its islands, which was disputed by other nations, particularly by England, the property of whose subjects had been from time to time seized by the United States for alleged violations of the statutes in question; and these controversies resulted in submitting the disputed question to an arbitration. 27 Stat. 948. Article 1 provides that:

"The questions which have arisen between the government of the United States and the government of her Britannic majesty, concerning the jurisdictional rights of the United States in the

waters of Behring Sea, and concerning also the preservation of the fur-seal in, or habitually resorting to the said sea, and the rights of the citizens and subjects of either country, as regards the taking of fur-seal in, or habitually resorting to the said waters, shall be submitted to a tribunal of arbitration." . . .

By the fourteenth article of the treaty or convention submitting the questions to arbitration it was provided that:

"The high contracting parties engage to consider the result of the proceedings of the tribunal of arbitration as a full, perfect and final settlement of all the questions referred to by the arbitrators."

In submitting the questions to the high court of arbitration, the government agreed to be bound by the decision of the arbitrators, and has since passed an act to give effect to the award rendered by the tribunal of arbitration. 28 Stat. 52. The award should, therefore, be considered as having finally settled the rights of the United States in the waters of Alaska and of Behring Sea, and all questions concerning the rights of its own citizens and subjects therein, as well as of the citizens and subjects of other countries.

The true interpretation of section 1956, and of the amendment thereto, depends upon the dominion of the United States in the waters of Behring Sea,—such dominion therein as was "ceded by Russia to the United States by treaty of 1867." This question has been settled by the award of the arbitrators, and this settlement must be accepted "as final." It follows therefrom that the words "in the waters thereof," as used in section 1956, and the words "dominion of the United States in the waters of Behring Sea," in the amendment thereto, must be construed to mean the waters within three miles from the shores of Alaska. On coming to this conclusion, this court does not decide the question adversely to the political department of the government. It is undoubtedly true, as has been decided by the Supreme Court, that in pending controversies doubtful questions, which are undecided, must be met by the political department of the government. "They are beyond the sphere of judicial cognizance," and, "if a wrong has been done, the power of redress is with Congress, not with the judiciary." The Cherokee Tobacco 11 Wall. 616-621. But in the present case there is no pending question left undetermined for the political department to decide. It has been settled. The award is to be construed as a treaty which has become final. A treaty, when

accepted and agreed to, becomes the supreme law of the land. It binds courts as much as an act of Congress. In *Head Money Cases*, 112 U. S. 580-598, 5 Sup. Ct. 254, the court said:

"A treaty is primarily a contract between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. . . . A treaty, then, is the law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute." *Chew Heong v. U. S.*, 112 U. S. 536, 540, 565, 5 Sup. Ct. 255; *U. S. v. Rauscher*, 119 U. S. 407-419, 7 Sup. Ct. 234.

The duty of courts is to construe and give effect to the latest expression of the sovereign will; hence it follows that, whatever may have been the contention of the government at the time *In re Cooper* was decided, it has receded therefrom since the award was rendered by an agreement to accept the same "as a full, complete, and final settlement of all questions referred to by the arbitrators," and from the further fact that the government since the rendition of the award has passed "an act to give effect to the award rendered by the tribunal of arbitration."

The decree of the district court is reversed, and the cause remanded, with instructions to the district court to dismiss the libel.

NOTE.—One of the most important tangible results of The Hague Conferences was the creation of a Permanent Court of Arbitration, which was instituted at the Conference of 1899 and strengthened at the Conference of 1907. The Hague Convention for the Pacific Settlement of International Disputes, adopted in 1907, was based upon the underlying principle stated in Article 37:

International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.

Recourse to arbitration implies an engagement to submit in good faith to the award.

The first case submitted to the Permanent Court was the *Plous Fund Controversy* between the United States and Mexico, which was decided in 1902. The decisions thus far rendered by the Permanent Court are not particularly important from a juristic standpoint. Their chief value lies in the fact that they demonstrate the feasibility of

settling many international controversies by arbitral methods. They are accessible in Wilson, *The Hague Arbitration Cases*, and in Scott, *The Hague Court Reports*. The latter is the more complete and contains also the reports of the International Commissions of Inquiry appointed in accordance with the provisions of The Hague Convention for the Pacific Settlement of International Disputes, 1899, Title III.

The literature of international arbitration is extensive. Among the most valuable works are the following: *Proceedings of the American Society for Judicial Settlement of International Disputes* (published annually 1910 to 1916); Andrew D. White, *Autobiography*, II, 250 (account of the First Hague Conference by the president of the American delegation); Holls, *The Peace Conference at The Hague* (by an American delegate to the First Conference); Scott, *The Hague Peace Conferences of 1899 and 1907* (by an American delegate to the Second Conference); Cobbett, *Cases and Opinions*, I, 24, 353; Evans Darby, *International Tribunals*; Hershey, *Essentials*, 327; Higgins, *The Hague Peace Conferences*; Lapradelle and Politis, *Recueil des Arbitrages Internationaux*; Morris, *International Arbitration and Procedure*; Phillipson, *Studies in International Law*; Ralston, *International Arbitral Law and Procedure*; Sir Frederick Pollock, "The Modern Law of Nations and the Prevention of War," *Cambridge Modern History*, XII, 703. Moore, *International Arbitrations*; Bonfils (Fau-chille), sec. 944; Hyde, II, 111; Moore, *Digest*, VII, 24.

The most important step yet taken toward the settlement of international controversies by judicial methods is the establishment by the League of Nations of the Permanent Court of International Justice. This tribunal consists of eleven titular and four supplementary judges who are to hold office for nine years. The first panel of judges has been chosen and the Court has been organized with its seat at The Hague. Unlike tribunals of arbitration this Court is a court of law, and it is empowered to hear and to decide any controversy which may be submitted to it. The distinction between justiciable and non-justiciable controversies is not recognized. While the Court does not possess compulsory jurisdiction, article 16 of the Covenant provides that if any member of the League shall go to war without first submitting its case to the Court or to some arbitral body, its action shall be regarded as an act of war against all the other members of the League. See Hudson, "The Permanent Court of International Justice," *Harvard Law Review*, XXXV, 245. The statute establishing the Court forms an appendix to this article. Also see Cobbett, *Cases and Opinions*, I, 41; Hyde, II, 141.

SECTION 2. REPRISALS.

WILLIAM GRAY, ADMINISTRATOR, v. THE
UNITED STATES.COURT OF CLAIMS OF THE UNITED STATES. 1886.
21 Ct. Cl. 340.

[By the treaty of 1800 between the United States and France it was agreed that in return for the relinquishment by France of all exclusive privileges secured to her by the treaties of 1778 the United States would relinquish all claims of American citizens against France growing out of French depredations upon American commerce between 1791 and 1800. In 1885 Congress enacted a law authorizing American citizens having "valid claims to indemnity upon the French Government arising out of illegal captures, detentions, seizures, condemnations, and confiscations" prior to the treaty of 1800, to bring suit in the Court of Claims, and directing that court to "determine the validity and amount" thereof. Under this act the present suit was brought for indemnity for the loss of the *Sally*, a schooner owned and commanded by Americans, laden with an American cargo, and which, while on a voyage from Massachusetts to Spain, was seized on the high seas by a French privateer, taken to a French port and condemned for the violation of a French regulation "concerning the navigation of neutrals."]

DAVIS, J., delivered the opinion of the court:

This claim, one of the class popularly called "French Spoliations," springs from the policy of the French revolutionary government between the execution of King Louis XVI and the year 1801, a policy which led to the detention, seizure, condemnation, and confiscation of our merchant vessels peacefully pursuing legitimate voyages upon the high seas. . . . [Here follows an elaborate account of the relations between the United States and France from 1777 to 1800.]

The defendants contend that the seizures were justified, as war existed between this country and France during the period in question; and, as we could have no claim against France for seizure of private property in time of war, the claimants could have no resulting claim against their own Government; that is,

the claims, being invalid, could not form a subject of set-off as it is urged these claims did in the second article of the treaty of 1800. It therefore becomes of great importance to determine whether there was a state of war between the two countries.

It is urged that the political and judicial departments of each Government recognized the other as an enemy; that battles were fought and blood shed on the high seas; that property was captured by each from the other and condemned as prize; that diplomatic and consular intercourse was suspended, and that prisoners had been taken by each Government from the other and "held for exchange, punishment, or retaliation, according to the laws and usages of war." While these statements may be in substance admitted and constitute very strong evidence of the existence of war, still they are not conclusive, and the facts, even if they existed to the extent claimed, may not be inconsistent with a state of reprisals straining the relations of the States to their utmost tension, daily threatening hostilities of a more serious nature, but still short of that war which abrogates treaties, and after conclusion of which parties must, as between themselves, begin international life anew.

The French issued decree after decree against our peaceful commerce, but, on the ground of military necessity incident to the war with Great Britain and her allies; they refused to receive our minister, but in that refusal, insolent though it was, there is nothing to show that war was intended, and the mere refusal to receive a minister does not in itself constitute a ground for hostilities.

The Attorney-General, Mr. Lee, in August, 1798, very strongly sustained the defendant's position, for he wrote the Secretary of State that there existed with France "not only an actual maritime war," but "a maritime war authorized by both nations;" that consequently France was an enemy, to aid and assist whom would be treason on the part of a citizen of the United States; but we cannot agree that this extreme position was authorized by the facts or the law.

Congress enacted the various statutes hereinafter referred to in detail, and when one of them, the act providing an additional armament, was passed in the House, Edward Livingston, who opposed it, said:

"Let no man flatter himself that the vote which has been given is not a declaration of war. Gentlemen know that this is the case,"

Those were times of great excitement; between danger of international contest and heat of internal partisan conflict statesmen could not look at the situation with the calmness possessed by their successors, and those successors, with some exceptions to be sure, regarded the relations between the countries as not amounting to war.

The question has been carefully examined by authorized and competent officers of the political department of the Government, and we may turn to their statements as expository of the view of that branch upon the subject. . . . [Here follow extracts from various reports to Congress expressing views similar to those of Senator Livingston and Senator Sumner.]

Mr. Livingston reported to the Senate in 1830 that—

“This was not a case of war, and the stipulations which reconciled the two nations was not a treaty of peace; it was a convention for the putting an end to certain differences. . . . Nowhere is the slightest expression on either side that a state of war existed, which would exonerate either party from the obligations of making those indemnities to the other. . . . The convention which was the result of these negotiations is not only in its form different from a treaty of peace, but it contains stipulations which would be disgraceful to our country on the supposition that it terminated a state of war. . . . Neither party considered then they were in a state of war.” (Rep. 4, 445.) . . .

Mr. Sumner considered the acts of Congress as “vigorous measures,” putting the country “in an attitude of defence;” and that the “painful condition of things, though naturally causing great anxiety, did not constitute war.” (38th Cong., 1st sess., Rep. 41, 1864.)

The judiciary also had occasion to consider the situation, and the learned counsel for the defendants cites us to the opinion of Mr. Justice Moore, delivered in the case of *Bass v. Tingy*, (4 Dall. 37), wherein the facts were as follows: Tingy, commander of the public armed ship the *Ganges*, had libelled the American ship *Eliza*, Bass, master, setting forth that she had been taken on the high seas by a French privateer the 31st March, 1799, and retaken by him late in the following April, wherefore salvage was claimed and allowed below. Upon appeal the judgment was affirmed. Each of the four justices present delivered an opinion.

Justice Moore, answering the contention that the word "enemy" could not be applied to the French, says:

"How can the character of the parties engaged in hostility of war be otherwise described than by the denomination of enemies? It is for the honor and dignity of both nations, therefore, they should be called enemies; for it is by that description alone that either could justify or excuse the scene of bloodshed, depredation, and confiscation which has unhappily occurred, and surely Congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy."

Justice Washington considers the very point now in dispute, saying (p. 40):

"The decision of the question must depend upon . . . whether at the time of passing the act of Congress of the 2d of March, 1799, there subsisted a state of war between two nations. It may, I believe, be safely laid down that every contention by force between two nations, in external matters, under the authority of their respective Governments, is not only war, but public war. If it be decreed in form it is called solemn and is of the perfect kind, because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against the members of the other in every place and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations more confined in its nature and extent, being limited as to places, persons, and things, and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act under special authority and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the Government retains the general power."

Applying this rule he held that "an American and French armed vessel, combating on the high seas, were enemies," but added that France was not styled "an enemy" in the statutes, because "the degree of hostility meant to be carried on was sufficiently described without declaring war, or declaring that

we were at war. Such a declaration by Congress might have constituted a perfect state of war which was not intended by the Government."

Justice Chase, who had tried the case below, said:

"It is a limited, partial war. Congress has not declared war in general terms, but Congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land, to capture unarmed French vessels, nor even to capture armed French vessels in a French port, and the authority is not given indiscriminately to every citizen of America against every citizen of France, but only to citizens appointed by commissions or exposed to immediate outrage and violence. . . . If Congress had chosen to declare a general war, France would have been a general enemy; having chosen to wage a partial war, France was . . . only a partial enemy."

Justice Patterson concurred, holding that the United States and France were "in a qualified state of hostility"—war "*quoad hoc*." As far as Congress tolerated and authorized it, so far might we proceed in hostile operations and the word "enemy" proceeds the full length of this qualified war, and no further.

The Supreme Court, therefore, held the state of affairs now under discussion to constitute partial warfare, limited by the acts of Congress.

The instructions to Ellsworth, Davie, and Murray, dated October 22, 1799, did not recognize a state of war as existing, or as having existed, for they said the conduct of France would have justified an immediate declaration of war, but the United States, desirous of maintaining peace, contented themselves "with preparations for defence and measures calculated to defend their commerce." (Doc. 102, p. 561.) Yet all the measures relied upon as evidence of existing war had taken effect prior to the date of these instructions. So the ministers, in a communication to the French authorities, said, as to the acts of Congress, "which the hard alternative of abandoning their commerce to ruin imposed," that "far from contemplating a co-operation with the enemies of the Republic [they] did not even authorize reprisals upon her merchantmen, but were restricted simply to the giving of safety to their own, till a moment should arrive when their sufferings could be heard and redressed." (Doc. 102, p. 583.)

France did not consider that war existed, for the minister said

that the suspension of his functions was not to be regarded as a rupture between the countries, "but as a mark of just discontent" (15 Nov., 1796, *Foreign Relations*, vol. I, p. 583), while J. Bonaparte and his colleagues termed it a "transient misunderstanding" (Doc. 102, p. 590), a state of "misunderstanding" which had existed "through the acts of some agents rather than by the will of the respective 'Governments,'" and which had not been a state of war, at least on the side of France. (Ib. 616.)

The opinion of Congress at the time is best gleaned from the laws which it passed. The important statute in this connection is that of May 28, 1798 (1 Stat. L., 561), entitled "An act more effectually to protect the commerce and coasts of the United States." Certainly there was nothing aggressive or warlike in this title.

The act recites that, whereas French armed vessels have committed depredations on American commerce in violation of the law of nations and treaties between the United States and France, the President is authorized—not to declare war, but to direct naval commanders to bring into our ports, to be proceeded against according to the law of nations, any such vessels "which shall have committed, or which shall be found hovering on the coasts of the United States for the purpose of committing, depredations on the vessels belonging to the citizens thereof; and also to retake any ship or vessel of any citizen or citizens of the United States which may have been captured by any such armed vessel."

This law contains no declaration or threat of war; it is distinctly an act to protect our coasts and commerce. It says that our vessels may arrest a vessel raiding or intending to raid upon that commerce, and that such vessel shall not be either held by an executive authority or confiscated, but turned over to the admiralty courts—recognized international tribunals—for trial, not according to municipal statutes, as was being done in France, but according to the law of nations. Such a statute hardly seems necessary, for if it extended at all the police powers of naval commanders upon the high seas it was in the very slightest degree, and it is highly improbable that then or now, with or without specific statutory or other authority, an American naval commander would in fact allow a vessel rightfully flying the flag of the United States to be seized on the high seas or near our coasts by the cruisers of another Government. But if the act did enlarge the power of such officers, and give to them author-

ity not theretofore possessed, it tied them down to specific action in regard to specified vessels.

They might seize armed vessels only, and only those armed vessels which had already committed depredations, or those which were on our coast for the purpose of committing depredations, and they might retake an American vessel captured by such an armed vessel. This statute is a fair illustration of the class of laws enacted at this time; they directed suspension of commercial relations until the end of the next session of Congress, not indefinitely (June 13, 1798, *ib.* § 4, p. 566); they gave power to the President to apprehend the subjects of hostile nations whenever he should make "public proclamation" of war (July 6, 1798, *ib.* 577), and no such proclamation was made; they gave him authority to instruct our armed vessels to seize French "armed," not merchant, vessels (July 9, 1798, *ib.*, 578), together with contingent authority to augment the army in case war should break out in case of imminent danger of invasion. (March 2, 1799, *ib.*, 725.) Within a few months after this last act of Congress the Ellsworth mission was on its way to France to begin the negotiations which resulted in the treaty of 1800 and even the act abrogating the treaties of 1778 does not speak of war as existing, but of "the system of predatory violence . . . hostile to the rights of a free and independent nation." (July 7, 1798, *ib.*, 578.)

If war existed, why authorize our armed vessels to seize French armed vessels? War itself gave that right, as well as the right to seize merchantmen, which the statutes did not permit. If war existed why empower the President to apprehend foreign enemies? War itself placed that duty upon him as a necessary and inherent incident of military command. Why, if there was war, should a suspension of commercial intercourse be authorized, for what more complete suspension of that intercourse could there be than the very fact of war? And why, if war did exist, should the President, so late as March, 1799, be empowered to increase the army upon one of two conditions, viz., that war should break out or invasion be imminent, that is, if war should break out in the future or invasion become imminent in the future?

Upon these acts of Congress alone it seems difficult to found a state of war up to March, 1799, while in February, 1800, we find a statute suspending enlistments, unless, during the recess of Congress, "war should break out with France." This is proof

positive that Congress did not then consider war as existing, and in fact Ellsworth, Davie, and Murray were at the time hard at work in Paris. In May following the President was instructed to suspend action under the act providing for military organization, although the treaty was not concluded until the following September.

This legislation shows that war was imminent; that protection of our commerce was ordered, but distinctly shows that, in the opinion of the legislature, war did not in fact exist.

Wheaton draws a distinction between two classes of war, saying:

"A perfect war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case, and under every circumstance permitted by the general laws of war. An imperfect war is limited as to places, persons, and things [to which the editor adds]: Such were the limited hostilities authorized by the United States against France in 1798." (Lawrence's Wheaton, 518.)

There was no declaration of war; the tribunals of each country were open to the other—an impossibility were war in progress; diplomatic and commercial intercourse were admittedly suspended; but during many years there was no intercourse between England and Mexico, which were not at war; there was retaliation and reprisal, but such retaliations and reprisals have often occurred between nations at peace; there was a near approach to war, but at no time was one of the nations turned into an enemy of the other in such manner that every citizen of one became the enemy of every citizen of the other; finally, there was not that kind of war which abrogated treaties and wiped out, at least temporarily, all pending rights and contracts, individual and national.

In cases like this "the judicial is bound to follow the action of the political department of the Government, and is concluded by it" (Phillips v. Payne, 92 U. S. R. 130); and we do not find an act of Congress or of the Executive between the years 1793 and 1801 which recognizes an existing state of solemn war, although we find statutory provisions authorizing a certain course "in the event of a declaration of war," or "whenever there shall be declared war," or during the existing "differences." One act provides for the increase of the army "in case war shall break out," while another restrains this increase "un-

less war shall break out." (1 Stat. L., 558, 577, 725, 750; see also acts of Feb. 10, 1800, and May 14, 1800.)

We have already referred to the instructions of the Executive, which show that branch of the Government in thorough accord with the legislative on this subject, and the negotiations of our representatives hereinafter referred to were marked by the same views, while the treaty itself—a treaty of amity and commerce of limited duration—is strong proof that what were called "differences" did not amount to war. We are, therefore, of the opinion that no such war existed as operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations; that, in short, there was no public general war, but limited war in its nature similar to a prolonged series of reprisals. . . .

NOTE.—Reprisals are a method of self-help resorted to by a state because of wrongs suffered either by the state itself or by its citizens at the hands of another state. The term is loosely employed, but it usually describes a seizure of the property of the offending state or of some of its citizens. While it is a method of self-defense not inconsistent with the maintenance of a state of peace, in practice it has frequently proved a step toward war. As it is a measure of retaliation, it should not be out of proportion to the injury received, nor should it be employed until all attempts at negotiation have failed or until it is apparent that any such attempt would be futile. Since it is employed only when a state is acting under a strong sense of injury it is a dangerous weapon and is easy of abuse. Nevertheless in a proper case it is recognized as lawful. In *The Schooner Endeavor* (1909), 44 Ct. Cl. 242, 268, the Court of Claims said:

To justify reprisals some specific wrong must be committed and the seizure must be made by way of compensation in value for such wrong. In other words, as a means of satisfaction without resort to actual war letters of marque are, or were formerly, issued by the state to certain of her citizens authorizing them to seize and take the person and property of the citizens of the offending state wherever found. But such reprisals when thus made will not become complete, justifying confiscation, until after hope of satisfaction has ceased or actual war has begun. . . .

While reprisals are acts of war in fact, it is for the state affected to determine for itself whether the relation of actual war was intended by them; and if it so elects to regard such acts then the property so seized becomes liable to confiscation at once; otherwise it is to be held until hope of satisfaction has ceased.

In the Great War several countries sought to protect themselves by means of reprisals. As soon as the Allies established their suprem-

acy upon the sea, German shipping sought refuge in neutral ports, and as German destruction of neutral vessels continued, and as the crews of German vessels committed acts which endangered the safety of shipping in the ports where their vessels lay, several countries seized the German vessels anchored in their harbors. In the cases of Italy and Portugal, which seized the vessels only a short time before the outbreak of war with Germany and after the policy of war had probably been determined upon, the seizure did not purport to be an act of reprisal. Portugal frankly said that she seized the ships because she needed them. In the cases of Brazil and Spain the situation was different. On January 31, 1917 Germany notified Brazil that its policy of unrestricted warfare was to be put into operation the next day. On February 13, Brazil replied to Germany that if diplomatic relations were to be maintained, Brazilian ships must not be attacked on any pretext whatever. Nevertheless in the night of April 3 and 4, the Brazilian merchant vessel Parana, the property of the Brazilian Government, was sunk with loss of life. Consequently on April 11, Brazil broke off diplomatic relations with Germany. On May 22, the Brazilian merchant ship Tijuca was sunk. The loss of these vessels and the threatened loss of others was so serious a blow to Brazilian commerce that the President on May 26 asked Congress for authority to take over and utilize the German vessels, forty-three in number, then in Brazilian waters. In his message the President said:

It is apparent that it is necessary to utilize the German merchant ships anchored in the ports of Brazil, excluding however all purpose of confiscation, as repugnant to the spirit of our laws and to the general sentiment of the country. The utilization should be based on the principles of the Convention signed at the Hague October 18, 1907 and should be without compensation until we can determine whether the ships are private property which even in case of war should be respected, in which case Brazil will respect them, or whether they belong to enterprises which are connected in some way with the Government.

Documentos Diplomaticos, 1914-1917, 57.

The requested authority was granted and on June 2 the President expropriated (*requisita*) the ships, gave them a Brazilian registry and Brazilian names, placed them under the Brazilian flag and handed them over for operation to the Lloyd Brasillero, a corporation then owned by the Brazilian Government and used as the Government's agent for the administration of the Government's merchant fleet. In reply to Germany's protest the Brazilian Minister of Foreign Affairs, Nilo Peçanha, said:

The measure adopted by the Government of the Republic of utilizing the German ships in consequence of the torpedoing of its merchant fleet, thus assuring immediately and directly, even though by force, satisfaction for the losses which have been caused us, was a legitimate defensive act,

founded upon Germany's own law and which all peoples practice alike, without quitting a state of peace, and for the precise purpose of compelling the offending nation to grant the redress which is imperatively due to them.

Documentos Diplomaticos, 1914-1917, 66.

When an attempt was afterward made to libel one of these ships for supplies furnished, the Supreme Court of Brazil, on August 8, 1917, in the case of Domschke and Company, affirmed the decree of the District Court of Bahia and held that the ships had been seized as an act of national defense, that by such seizure title had passed to Brazil and that as state property they were not subject to libel.

On August 21, 1918, Spain issued a statement in which it said that as more than thirty per cent of the Spanish merchant marine had been sunk, with consequent embarrassment to Spanish commerce, the German Government would be notified that in case of further sinkings German vessels then lying in Spanish ports would be substituted therefor. This however was not to involve confiscation, but would be "only a temporary solution until the establishment of peace, when Spanish claims also will be liquidated." Pursuant to this announcement, about ninety German vessels were seized. As nothing was said about the payment of indemnity, the seizure may be regarded as an act of reprisal for the losses inflicted on the Spanish merchant fleet. At the same time Spain reiterated her purpose to maintain a strict neutrality.

For a further discussion of reprisals see Cushing, *Administrator v. United States* (1887), 22 Ct. Cl. 1, 37; Hooper, *Administrator v. United States* (1887), 22 Ct. Cl. 408, 428, 456; Cobbett, *Cases and Opinions*, I, 347, 359; Bonfils (Fauchille), sec. 975; Hyde, II, 172; Moore, *Digest*, VII, 119.

SECTION 3. EMBARGO.

THE BOEDES LUST.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1804.
5 C. Robinson, 233.

[On May 16, 1803, the government of Great Britain imposed an embargo on all Dutch property in British ports. In consequence, the Boedes Lust, a vessel belonging to residents of the Dutch colony of Demerara, was seized. The next month war was declared between England and Holland. In December, 1803, the colony of Demerara was ceded to England. The original owners now seek to recover the vessel.]

SIR WILLIAM SCOTT [LORD STOWELL]. . . . The claim is given for several persons as inhabitants of Demerara, not settling there during the time of British possession, nor averring an intention of returning when that possession ceased. They are therefore to be treated under this general view as Dutch subjects, unless it can be shown that there are any other circumstances by which they are protected. It is contended that there are such circumstances and that they are these: That the property was taken in a state of peace, and that the proprietors are now become British subjects, and consequently that this property could not be considered as the property of an enemy, either at the time of capture or adjudication. Now, with respect to the first of these pleas, it must be admitted, that alone would not protect them, because the Court has, without any exception, condemned all other property of Dutchmen taken before the war—And upon what ground?—That the declaration had a retroactive effect, applying to all property previously detained, and rendering it liable to be considered as the property of enemies taken in time of war. This property was seized provisionally, an act hostile enough in the mere execution, but equivocal as to the effect, and liable to be varied by subsequent events, and by the conduct of the Government of Holland. If that conduct had been such as to reestablish the relations of peace, then the seizure, although made with the character of a hostile seizure, would have proved in the event a mere embargo, or temporary sequestration. The property would have been restored, as it is usual, at the conclusion of embargoes; a process often resorted to in the practice of nations, for various causes not immediately connected with any expectations of hostility. During the period that this embargo lasted, it is said, that the Court might have restored, but I cannot assent to that observation; because, on due notice of embargoes, this Court is bound to enforce them. It would be a high misprision in this Court, to break them, by re-delivery of possession to the foreign owner of that property, which the Crown had directed to be seized and detained for farther orders. The Court acting in pursuance of the general orders of the State, and bound by those general orders, would be guilty of no denial of justice, in refusing to decree restitution in such a case, for it has not the power to restore. Its functions are suspended by a binding authority, and if any injustice is done that is an account to be settled be-

tween the States. The Court has no responsibility, for it has no ability to act.

This was the state of the first seizure. It was at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure. It is declared to be no embargo, it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus*, by which it was done, that it was done *hostili animo*, and is to be considered as an hostile measure *ab initio*. The property taken is liable to be used as the property of persons, trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities. No such convention is set up on either side, and the State, by directing proceedings against this property for condemnation, has signified a contrary intention. Accordingly the general mass of Dutch property has been condemned on this retroactive effect; and this property stands upon the same footing as to the seizure, for it was seized at the same time, and with the same intent. . . .

The Settlement [Demerara] has since surrendered to the British arms, and the parties are become British subjects; and this, it is said, takes off the hostile effect, although it might have attached. This argument to be effective, must be put in one of these two ways, either that the condemnation pronounced upon Dutch property went upon the ground that, though seized in time of neutrality, it could not be restored only, because the parties were not now in a condition to receive it; or else, that though seized at a time, that may to some effects be considered as time of war, yet the subjects, having become friends, are entitled to restitution. This latter position cannot be maintained for a moment. It is contradicted by all experience and practice, even in the case of those who had an original British character. . . . Where property is taken in a state of hostility, the universal practice has ever been to hold it subject to condemnation, although the claimants may have become friends and subjects prior to the adjudication. The plea of having again become

British subjects, therefore, will not relieve them, and the other ground must be resorted to. That is equally untenable in point of fact; for the condemnation of the other Dutch property proceeded on no such ground as the mere incapacity of the proprietors to receive restitution. It proceeded on the other ground, which I have before mentioned, the retroactive effect of the declaration, which rendered their property liable to be treated as the property of enemies at the time of seizure. . . .

NOTE.—The laying of an embargo is an act of state, *The Theresa Bonita* (1802), 4 C. Robinson, 236. The term is applied to two measures which from a juristic standpoint are of an entirely different character. The first is an embargo laid by a country upon its own ships either for the purpose of protection or for the enforcement of some measure of the country's policy. This is purely a municipal regulation and while it may affect other countries it is not a measure to which they have a right to object. See Phillimore, III, 44. The American Embargo Acts of 1807 and 1809 were measures of this kind. For a full citation of cases arising under them see Moore, *Digest*, VII, 142. An embargo may also be laid with hostile intent upon the property of citizens of other countries, either for the purpose of compelling other countries to adopt a desired line of action, in which case it is in essence only a form of reprisal or retaliation, or because war is anticipated or has actually begun. See *The Gertruyda* (1799), 2 C. Robinson, 211, 219; Cobbett, *Cases and Opinions*, I, 351, 359; Bonfils (Fauchille), sec. 985; Hyde, II, 182.

CHAPTER XI.

THE BELLIGERENT RELATIONS OF STATES.

SECTION 1. THE BEGINNING OF WAR.

THE PRIZE CASES.

THE BRIG AMY WARWICK. THE SCHOONER CRENSHAW. THE BARQUE HIAWATHA. THE SCHOONER BRILLIANTE.

SUPREME COURT OF THE UNITED STATES. 1863.

2 Black, 635.

[The four vessels concerned in these cases had been captured by public vessels of the United States for attempting to violate the blockade of the so-called Confederate States which had been established by President Lincoln's proclamations of April 19 and April 27, 1861. They were libelled on behalf of the United States and in each case the District Court pronounced a decree of condemnation from which the several owners appealed. Besides the questions peculiar to each case, the court was obliged to consider certain fundamental questions as to the validity of the blockade.]

MR. JUSTICE GRIER. There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, 1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the government, on the principles of international law, as known and acknowledged among civilized States?

2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property"?

I. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purpose of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade *de facto* actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Commander-in-Chief of the Army and Navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the *jus belli*, and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us inquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents,—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their

liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

"This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c.; the war will become cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and know.

The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land."

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the Army and

Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral." Lord Stowell (1 Dodson, 247) observes, "It is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13, 1846, which recognized "a state of war as existing by the act of the Republic of Mexico." This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations

acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the *Santissima Trinidad* (7 Wheaton, 337), this court say: "The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war." (See also 3 Binn., 252.)

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the Government of the United States of America and certain States styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the Government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies because they are traitors, and a war levied on the government by traitors, in order to dismember and destroy it, is not a war because it is an "insurrection."

Whether the President, in fulfilling his duties as Commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of

the Government to which this power was intrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "*ex majore cautela*" and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been issued and done under the previous express authority and direction of the Congress of the United States."

Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, "*omnis ratihabitio retrotrahitur et mandato equiparatur*," this ratification has operated to perfectly cure the defect. In the case of *Brown vs. United States* (8 Cr., 131, 132, 133), Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"

Although Mr. Justice Story dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is *ex post facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal Court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question therefore we are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard. . . .

UNITED STATES OF AMERICA v. PELLY AND
ANOTHER.

QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE OF ENGLAND.
1899.

4 Commercial Cases, 100.

[On April 21, 1898, the plaintiff, through Lieutenant Sims, Acting Naval Attaché of the American Embassy in London, contracted for the purchase of two steamers belonging to a company of which the defendants were managers. The contract provided that the vendors should deliver the steamers in New York "as soon as possible," and that a deposit of ten per cent of the purchase price should be paid on the signing of the contract. It was also agreed (clause 7) that "if from blockade or any other cause arising from the United States of America becoming belligerents and preventing delivery of either of the said steamers this contract is to be null and void, but the vendor is to retain the deposit as and for liquidated damages." On April 21, the American fleet sailed from Key West and on April 22 a Spanish ship, the Buena Ventura, was captured. News of this capture was published in the London evening papers of April 22 and in The Times of April 23. On April 26, Congress adopted a resolution declaring that war existed and had existed since April 21 between the United States and Spain. On the same day, April 26, the British proclamation of neutrality dated April 23 was issued. On April 23 the defendants notified the American Embassy that in consequences of the outbreak of war they were prevented from delivering the steamers. Lieutenant Sims replied the same day, "The fact of a state of war existing between the United States and Spain has no bearing on the case so far as you are concerned. No man in England has, or will have, any official knowledge of the state of affairs until his Government notifies him of the fact by a proclamation of neutrality." The steamers not having been delivered, this action was

brought to recover the deposit of £5,300. The defendants relied upon the British Foreign Enlistment Act, 1870 (33 and 34 Vict. c. 90) which provides: "S. 8. If any person within Her Majesty's dominions, without the license of Her Majesty, does any of the following acts; that is to say . . . (4) Despatches or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: Such person shall be deemed to have committed an offence against this Act."]

BIGHAM, J. . . . The defendants were bound to do their best to get the ships despatched "as soon as possible," and one reason for that was, as the United States knew, that it was desirable to get the ships away before the Foreign Enlistment Act operated to interfere with their departure. It has been suggested that the defendants from the very first intended to defeat the object of the contract and so make sure of retaining the deposit and in that way realize a profit without giving any consideration for it. I do not think that there is the least ground for making that suggestion. The evidence satisfies me that the defendants did their best on April 22 to carry out the contract all through the day and I am satisfied that by the morning of April 23—that is to say, before the defendants had time to get the ships afloat on their voyage to New York—they had ascertained, as the fact was, that a state of war existed. I will state why it is a fact that a state of war then existed. An act of hostility had been committed on April 22 by American men-of-war against Spanish traders, or, at all events, against one Spanish trader, which act, in my opinion, was only consistent with the existence of a state of war. Further, on April 22 the American President issued a proclamation in which he declared a general blockade of Cuba. A few days later the Congress passed a resolution authorizing a formal state of war, but, in so doing, recorded, what was undoubtedly the fact, that a state of war had existed from some days previously. It is therefore true to say that a state of war existed on April 23, and I am inclined to think that it existed also on April 22 and 21, but it is not necessary to decide that. On April 23 the defendants realized the actual state of things and communicated with Lieutenant Sims. He being, very probably, anxious to do all he could to get the contract performed, gave his view, insisting, wrongly, as I think,

that there could be no state of war affecting the defendants unless and until war was formally recognized by our Government. . . . In these circumstances the question is whether the defendants were prevented, within the meaning of clause 7 of the contract, from delivering the ships. [His Lordship read S. 8 of the Foreign Enlistment Act, 1870.] In my opinion if the defendants had proceeded with the despatch of the vessels on or after April 23 they would have violated that section and have brought themselves within the Act. It is sufficient to say that, if a man finds himself doing some act which is contrary to law, he is "prevented" from doing that act. Clause 7 of the contract does not merely mean physical prevention, but that, if it is improper or wrong for the defendants to deliver the ships, the defendants are not to do so, but are in that event to be compensated for their trouble and expenses by retaining the deposit. For these reasons there will be judgment for the defendants, with costs. . . .

NOTE.—From early times it was customary to institute wars by a formal declaration. In the eighteenth century that custom fell into disuse. See Maurice, *Hostilities without Declaration of War*, for the practice from 1700 to 1870. The Franco-Prussian War was begun by a formal declaration and that has been the general custom since, and is enjoined by The Hague Conventions. But since war is a status, its existence does not depend upon a formal declaration, but only upon the fact. In *The Marie Magdalena* (1779), Hay and Marriott, 247, Sir John Marriott said:

Where is the difference, whether a war is proclaimed by a herald at the Royal Exchange, with his trumpets, and on the Pont Neuf at Paris, and by reading and affixing a printed paper on public buildings; or whether war is announced by royal ships, and whole fleets, at the mouths of cannon?

War may begin therefore with the first act of hostility, *The Teutonia* (1872) 8 Moore, P. C. (N. S.) 411. In April, 1778, France despatched an expedition under D'Estaing to the aid of the American colonists. It arrived in the Delaware on July 7, but France did not declare war until July 28. The Russo-Japanese War was begun without a formal declaration. In the case of *The Argun* (1904), Takahashi, 573, the claimant argued that the vessel should be restored because captured before the declaration of war. To this the Prize Court of Sasebo replied:

When diplomatic negotiations concerning the Manchurian and Korean questions were going on between Japan and Russia, the latter country unreasonably failed to give her answer to Japan. On the other hand, she showed great ac-

tivity in her army and navy, sent her land forces to Manchuria and Korea, collected her war vessels at Port Arthur, and thus showed her determination to fight. This fact was clear. Whereupon Japan, on the 5th day of the 2nd month of the 37th year of Meiji, notified Russia that all diplomatic relations were at an end. At the same time Japan made preparations for action and the next day, the 6th at 7 A. M., her fleet left Sasebo with the object of attacking the Russian fleet. Inferring from the conduct of the navies of both countries and from the state of things at the time, that hostile operations were publicly opened prior to the capture of the steamship now under consideration; and as it is thus clear that a state of war had begun before the time of the ship's capture, there is no need to discuss whether it was made before the declaration of war or not.

For an account of the controversy growing out of Japan's attack on Russia before the declaration of war, see Pitt Cobbett, *Cases and Opinions*, II, 1; *Int. Law Sit.* 1910, 58; Asakawa, *The Russo-Japanese Conflict*; Hershey, *The International Law and Diplomacy of the Russo-Japanese War*; Lawrence, *War and Neutrality in the Far East*; Ariga, *La Guerre Russo-Japonaise*; Rey, *La Guerre Russo-Japonaise*. The Russian side of the controversy is stated by the eminent Russian jurist, F. de Martens, in *Revue Générale de Droit International Public*, XI, 148. His view is that a formal declaration of war is not necessary provided the relations between the two countries are such that war is not an improbable eventuality.

In the Great War of 1914, there was a formal declaration in each instance. See Phillipson, *International Law and the Great War*, ch. iii. Although France did not declare war on Turkey until November 5, 1914, the French Prize Court held that a state of war existed *de facto* from October 29, 1914 when the Turks bombarded Odessa and two French citizens on board a French ship were killed, *The Mahrousseh* (1915), *Décisions du Conseil des Prises*, I, 94. On the war between the United States and Spain, see *The Pedro* (1899), 175 U. S. 354. The American Civil War began in each of the seceding States on the day on which President Lincoln's proclamation of blockade took effect therein, *The Protector* (1872), 12 Wallace, 700. A declaration of war may be preceded by an ambiguous state of things which will cause the declaration to operate retroactively, *The Herstdelder* (1799), 1 C. Robinson, 114.

The method of Brazil's entry into the Great War presents some unusual features. After the sinking of the *Parana* with loss of life on the night of April 3 and 4, 1917 Brazil broke off diplomatic relations with Germany. When the United States declared war on Germany on April 6, 1917 Brazil issued the customary proclamation of neutrality, but on May 11, the President of Brazil said to the Brazilian Congress:

The Brazilian nation, with firmness but without hostile intentions, can take into consideration through its legislative

organ the fact that one of the belligerents is an integral part of the American continent and that we are bound to that belligerent by traditional friendship and by the same political ideal as to the defense of the vital interests of America and of the accepted principles of international law.

In response to this intimation, Congress on June 1, 1917, adopted a decree which revoked the neutrality of Brazil in the war between the United States and Germany. Meanwhile the Germans on May 22 had sunk the Brazilian merchantman *Tijuca*. Because of these and other acts of aggression the Congress, upon recommendation of the President, adopted, on October 26, 1917, a decree containing the following words:

There is recognized and proclaimed a state of war initiated by the German Empire against Brazil.

This resolution, like that adopted by the American Congress on April 25, 1898, recognized a state of war as already existing, but unlike the American resolution it did not fix the date when the war status began. Since Brazil accepted the hostile acts of Germany as constituting war, the war status may be said to date from the first of those acts which she chose to regard as an act of war. Hence the war may have begun at least as early as the sinking of the *Parana* on April 3. The Brazilian documents may be found in *Guerra da Europa, Documentos Diplomaticos, Attitude do Brasil, 1914-1917*, published by the Ministry of Foreign Affairs.

Prior to the actual outbreak of war, its imminence will justify precautions, *The Teutonia* (1870), L. R. 4 P. C. 471. War may exist by the declaration of one belligerent only, *The Nayade* (1802), 4 C. Robinson, 251; *The Success* (1812), 1 Dodson, 133; *The Pedro* (1899), 175 U. S. 354. On this point Lord Stowell in *The Eliza Ann* (1813), 1 Dodson, 244, said:

A declaration of war by one country was not a mere challenge to be accepted or refused by the other. On the contrary, it served to show the existence of actual hostilities on one side at least; and hence put the other party also into a state of war, even though he might think proper to act on the defensive only.

The assumption by governments of the exclusive right to wage war, the employment in war of no forces but those under public control and the abolition of privateering have led to the abandonment of the distinctions made in the eighteenth century and earlier between a perfect and a limited or imperfect war, between a war which is solemn and public and one which is not,—distinctions which appear in *Bas v. Tingy* (1800), 4 Dallas, 35, and *Talbot v. Seaman* (1801), 1 Cranch, 1. The labored efforts of the United States Supreme Court to characterize the relations between the United States and France at the end of the eighteenth century as a kind of limited war while at the same holding that the two countries were not at war demon-

strated the futility of the distinctions which it sought to make. Likewise the attempt of President Wilson in his address to Congress on April 2, 1917, to reconcile hostilities against the German government with the existence of friendship for the German people may have been justified by considerations of policy, but it has no basis in law or in international practice. Hostile measures may be adopted by one nation against another without producing a war status, and the intent with which such measures are adopted may long remain in doubt; but if the war status is created, it is necessarily that which the older writers described as solemn, public and perfect war.

On the whole subject see Barclay, *Law and Usage of War*; Bordwell, *The Law of War*; *Int. Law Stt.* 1910, 45; *Int. Law Topics*, 1913, 54; Cobbett, *Cases and Opinions*, II, 1; Hyde, II, 195; Bonfils (Fauchille), sec. 1027; Moore, *Digest*, VII, 168.

SECTION 2. THE STATUS OF ALIEN ENEMIES.

EX PARTE BELLI.

SUPREME COURT OF SOUTH AFRICA. 1914.

S. A. Law Reports [1914] C. P. D., Part 1, 742.

MAASDORP, J. P. The petitioner in this case says that he is a German subject, that he arrived in this country as far back as the year 1906, and that he has since been employed in the service of certain dentists, who practise in this town. Lately he was called upon as a German subject, by some notice put in the papers, to report himself from time to time at the magistrate's court. This injunction he seems to have observed, but later on he received a further injunction requiring him to present himself, equipped in a certain way, in order that he might be removed to the Transvaal. . . . Petitioner now asks the Court to protect him from this injunction, on the ground that it is illegal. . . .

A great deal of authority has been cited at the Bar which deals very generally with the rights of alien subjects and enemy subjects, and I think the matter may be narrowed down largely to merely considering now what the position of the petitioner is in this particular case, and I cannot do better, in order to abridge my remarks as much as possible, than refer to the positive law of the country and international law, as laid down by Halleck in his work on International Law. He states, in chap-

ter 17, section 13: "One of the immediate consequences of the position in which the citizens and subjects of belligerent States are placed by the declaration of war is that all the subjects of one of the hostile Powers within the territory of the other are liable to be seized and retained as prisoners of war." If this is a correct statement of the law, then the petitioner in this case would be liable to be seized and detained as a prisoner of war. That, on the face of it, appears to be a very harsh rule, but it may be administered in a lenient manner, so as to cause as little prejudice as possible, and different nations have, in dealing with this rule, modified it and mitigated its harsh character. In the passage immediately following, Halleck says: "But this extreme right, founded on the positive law of nations, has been stripped of much of its rigour in modern warfare by the milder rules resulting from the usage of nations, the stipulations of treaties, and the municipal laws and ordinances of particular States."

It would, therefore, follow that in the necessities of war it might at times be necessary for the State to use what appeared to be harsher measures than at other times. The right exists to enforce the rule that has been stated, and the only question is as to the manner in which it should be employed, and the discretion in that respect is in the Government of the country, because there is no positive rule of law in the country which this Court can enforce in order to prevent the Government from using its discretion in the matter. Halleck gives the different instances in which from time to time this rule has become milder in its application, and he concludes thus: "Other nations have made similar decrees, but, however strong the current of modern authority in favor of the milder principle, nevertheless the ancient and stricter rule must still be regarded as the law of nations." That being the law of nations—and we are now asked to enforce the law of nations—it would appear that the law we are called upon to enforce is a law that leaves the whole matter in the discretion of the Government. There is one passage more I desire to quote from Halleck, in which he deals with enemy property found in a country at a time when war has been declared: "What we have said of the detention of the enemy's person holds good with respect to the right to seize and confiscate that enemy's property found within territory of the other belligerents at the commencement of hostilities. In former times this right was exercised with great rigour, but it has now be-

come an established, though not an inflexible rule of international law, that such property is not liable to confiscation as a prize of war." Now, although he describes this rule as a rule of international law, he goes on to say, "'This rule,' says Marshall, C. J., 'like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the Sovereign, it is a guide which he follows or abandons at his will; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule of law, but depends on political considerations, which may continually vary.'"

Without making any further general remarks, I may refer to one more authority in Vol. 14 of the Encyclopedia of the Laws of England (p. 564), viz.: "The question whether a belligerent State should allow subjects of the State with which it is at war to remain in the country or not is entirely governed by the necessities of war." All these amendments of international law are subject to the necessities of war. The "necessities of war" is a matter that this Court cannot deal with. It is a matter really within the knowledge and affects the discretion of the Government, and it would seem from the petition which has been put in that the Government of this country, acting through the authorities which are mentioned as dealing with this particular case at the magistrate's court, consider it advisable that certain enemy subjects, they being German subjects, should for the present be removed from certain parts of the country to another part of the country. So far as we know, there is no intention to deal harshly with these people. They are simply removed from this part of the country to the Transvaal. That is all the petition tells us, and, although it may be a hardship, I have no doubt that the instructions here given by the Government under the necessities of the case will be carried out in such a way as to cause as little hardship to those who come under it as possible. What the petitioner says is that he has been illegally treated. He has not satisfied the Court that he has been illegally treated, and he should have satisfied the Court by pointing out some law in this country under which the Court can protect him, and he has certainly failed to do so. Under the circumstances, I think the application must be refused.

SCHAFFENIUS v. GOLDBERG.

COURT OF APPEAL OF ENGLAND. 1915.
 Law Reports [1916] 1 K. B. 284.

[The plaintiff, a native-born citizen of Germany who had resided in England for twenty-two years prior to 1914, was duly registered in August, 1914, as an enemy alien. His conduct had been unobjectionable. After the outbreak of war he had entered into a contract with the defendant, a British subject, for the manufacture of picture mouldings, and the performance of the contract was begun by both parties. On July 1, 1915, the plaintiff was interned simply as part of the general policy of internment all enemy male aliens of military age. Afterward and while interned, plaintiff instituted suit to compel the return of money advanced to the defendant, who answered that the plaintiff's internment operated as a revocation of his license to remain in the kingdom, made him a prisoner of war and hence disabled him from maintaining any suit in the King's courts. Mr. Justice Younger having held that internment did not prevent the plaintiff from maintaining this suit, the defendant appealed.]

LORD COZENS-HARDY M. R. . . . The only point which has been tried is whether the plaintiff can take any proceedings having regard to his internment—in other words, whether he is *exlex* and has no *locus standi* in the Courts, so that the action ought to be dismissed. Younger J. made a declaration that the contract between the plaintiff and the defendant was not affected by the plaintiff's internment, and that the plaintiff was entitled to sue upon the contract and maintain an action. From that decision this appeal is brought.

I think one must be very careful in deciding the case neither expressly nor by reasonable implication to say anything inconsistent with the judgment of the full Court of Appeal in the case of *Porter v. Freudenberg*, [1915] 1 K. B. 857, delivered by Lord Reading, but delivered by him after the most elaborate discussion with all the other members of the Court. What did that case decide? It decided that for the purpose of trading it is not a person's nationality that determines whether he is an "alien enemy." That is not the test. It decided also, approving Sargant J.'s judgment in *Princess Thurn and Taxis v. Mof-*

ftt, [1915] 1 Ch. 58, that registration operated as a license by the Crown to the registered person to remain commorant here. It did not decide, nor could the Court have reasonably been asked to decide, that such a license could not be revoked by the Crown. But there is no circumstance here which can be suggested for one moment as affording evidence of revocation unless it be the internment which took place in July of this year. We have been taken back to a number of authorities, most of which were referred to and discussed in *Porter v. Freudenberg*, the case heard before the full Court of Appeal. I do not intend to go back on anything that was said there, but there is one point at least in this case which may be taken to be a new point, and it is this. It is said that though it is true that registration has the effect of a permission from the Crown to remain in this country, that permission only lasts so long as the licensee does not molest the Crown and is not molested by it; and it is further said that the plaintiff is plainly molested by being kept in confinement in the Isle of Man under the internment Order. I think there is absolutely no authority for that proposition. One authority relied upon was the case of *Wells v. Williams*, 1 *Ld. Raym.* 283; 1 *Salk.* 46, and reliance was placed on one passage only. The judge presiding in the Court said this: "Though the plaintiff came here since the war, yet if he has continued here by the King's leave and protection ever since, without molesting the Government or being molested by it, he may be allowed to sue, for that is consequent on his being in protection." What is the meaning of those words "being molested by the Crown"? I think they mean only this, that if it be shown that, although the license was given by the Crown, that license was subsequently withdrawn by the Crown, that is a molestation, which would prevent, or might prevent, the plaintiff from suing. I do not rely solely upon that construction of these words, because the case is reported more than once. In the report in *Salkeld* the words which I have read about molesting the Government, or being molested by the Government, are not to be found. The judgment is very short, and I will read the material portion of it: "If an alien enemy comes hither *sub salvo conductu*, he may maintain an action: if an alien enemy comes hither in time of peace, *per licentiam domini regis*, as the French Protestants did, and lives here *sub protectione*, and a war afterwards begins between the two nations, he may maintain an action; for suing is but a consequential right of protection." That judgment

seems to me to put the case of *Wells v. Williams* on a perfectly satisfactory foundation, and I entirely decline to assume that such an important proposition as the appellant here relies upon can be established upon a single sentence in a short judgment in Lord Raymond's reports. The observation in question seems to me to be wholly irrelevant, and, if I may respectfully say so, either it must be wrong, or else "molesting" refers to the revocation by the Crown under its prerogative of the license to remain in this country.

Then it is said that there is no authority at all which supports the contention in this case, and there is authority against it, and we have been referred to three old cases which have laid down the proposition, which I do not for a moment question, that a writ of habeas corpus cannot be taken out by a prisoner of war, and also to the very recent case in the Divisional Court of *Rex v. Superintendent of Vine Street Police Station, Ex parte Liebmann*, [1916] 1 K. B. 268, in which it was held that an interned prisoner was equally unable to apply for a writ of habeas corpus. That is all that that case decided, and the decision seems to me, if I may respectfully say so, to be perfectly right; but, speaking for myself only, I desire not to be held to accept in its entirety the language used by the two learned judges, Bailhache J. and Low J. It is sought to treat those observations as a decision that an interned German in the circumstances in which the plaintiff finds himself is for the purpose of enforcing civil rights to be treated as a prisoner of war in the same way as if he had been captured in a German ship, or at some point in Flanders or elsewhere. Any such decision would, I think, be an extension of the law which I cannot in any way countenance. But I do not think that the case is really so bare of authority as was suggested. One of the cases to which our attention has been properly called is that of *Sparenburgh v. Bannatyne*, 1 Bos. & P. 163, 168. In that case the question was whether a German taken on a Dutch privateer vessel which was properly captured by the British Government could whilst a prisoner of war bring an action for wages due. The Court, consisting of Eyre C. J., Heath J., and Rooke J., dealt with it in observations which seem to me to be very helpful. Eyre C. J. says: "But a neutral, whether in or out of prison, cannot, for that reason, be an alien enemy; he can be an alien enemy only with respect to what he is doing under a local or temporary allegiance to a Power at war with us. When the allegiance determines,

the character determines. He can have no fixed character of alien enemy who owes no fixed allegiance to our enemy, and has ceased to be in hostility against us: it being only in respect of his being in a state of actual hostility that he was even for a time an enemy at all. As a prisoner of war, how does he differ from any other individual who is in custody for an offence which he has committed, and for which he is answerable"? A prisoner who may be committed to prison for an offence is not *exlex*—he is entitled to assert his civil rights; and it is not right to say in this case that the plaintiff, although his personal liberty is curtailed by the internment Order, as it was, though to a less extent, by the Order under the Aliens Restriction Act, has lost all power of enforcing his rights in respect of the trade which he has been carrying on without any possibility of complaint since the agreement entered into by him in March of this year. But the matter does not rest there. Heath J. says this, 1 Bos. & P. 170: "Next to the general question, the pleas state that the plaintiff was adhering to the King's enemies; that must be proved in all their parts; but a prisoner at war is not adhering to the King's enemies, for he is here under protection of the King. If he conspires against the life of the King it is high treason; if he is killed, it is murder; he does not therefore stand in the same situation as when in a state of actual hostility. It has been said, that a prisoner at war cannot contract; his case would be hard indeed if that were true"—which I think must be taken to mean that he can contract and can assert his rights under the contract. Then lower down Heath J. says: "The contract in question was made by the permission of the King's officer, and therefore by the license of the King, under whose authority the officer may be presumed to have acted." Rooke J. says the same thing: "An enemy under the King's protection may sue and be sued: that cannot be doubted. A prisoner at war is for certain purposes under the King's protection, and there are many cases where he can maintain an action. I will suppose that an officer of high rank on his parole is possessed of a ring or jewel of great value, on which he wants to raise money, and that a tradesman is so dishonest as to receive it from him, and refuse either to advance the money or return the pledge. Surely the Court would say that he might recover his ring or his jewel from the tradesman." If authority be wanted in support of the view I take I think it is to be found in the case of Sparenburgh v. Bannatyne, 1 Bos. & P. 163. But I do not

base my judgment upon that case alone. It seems to me to be in accordance with general principles, and only in accordance with general principles, that the restraint which is imposed upon the personal movements of an interned German does not deprive him of civil rights in respect of a lawful contract entered into by him before the internment.

For these reasons I think the appeal fails and must be dismissed with costs.

[BANKES L. J. and WARRINGTON L. J. delivered concurring opinions.]

NOTE.—The status of alien enemies is not determined by international law but by the municipal law of the country where they are found. The distinction between alien enemy and alien friend is in English law as old at least as Magna Charta, (see ch. 42). When England was overrun with foreigners, especially court favorites, the distinction seems to have been lost sight of, but in the fifteenth century it was revived (Littleton, *Tenures*, 198), and the plea of alien enemy came to be recognized as a sufficient defense to any personal action which he might bring. But as early as Calvin's Case (1608), 7 Reports, 18a, distinctions began to be made. There was the "*amicus permissus*, an enemy that cometh into the realm by the King's safe conduct,"—a favored person, who in *Wells v. Williams* (1697), 1 Lord Raymond, 282, was allowed to sue because he enjoyed the King's protection. But without such protection the alien enemy in England was practically an outlaw. In *Sylvester's Case* (1701), 7 Modern, 150, the court said:

If an alien enemy come into England without the Queen's protection he shall be seized and imprisoned by the law of England and he shall have no advantage of the law of England nor for any wrong done to him here.

In *Boulton v. Dobree* (1808), 2 Camp. 163, it was held that a resident alien enemy must offer affirmative proof of his right to remain. "Although he went at large," said Lord Ellenborough, "it did not appear that government knew he was in the Kingdom." Chancellor Kent took a more liberal view. "By the law of nature," he said, "an alien who comes to reside in a foreign country is entitled, so long as he conducts himself peaceably, to continue to reside there, under the public protection; and it requires the express will of the sovereign power to order him away." *Clarke v. Morey* (1813), 10 John. 69. *A fortiori* if a belligerent state enacts any regulations for the control of enemy aliens within its limits, such as registration, those who comply therewith may reasonably argue that such compliance gives them a license to remain.

At the outbreak of war, a belligerent state is confronted by two questions with regard to the enemy aliens who may be within its borders:

1. Shall it allow them to withdraw? The situation of an enemy alien in the territory of a hostile state was attended with so much hardship that the privilege of withdrawal was highly prized. There have been comparatively few instances of wholesale detention, but there is no rule of international law on the subject, and the negotiation of a long list of treaties in which the privilege of withdrawal was expressly stipulated intimates the existence of the right of detention in the absence of treaty provision to the contrary and the fear that the right would be exercised. Vattel argued that a sovereign who initiated a war would be guilty of bad faith if he failed to allow the subjects of his enemy a reasonable time in which to withdraw. On the other hand with the present rule of universal military service, there are sound reasons of public policy justifying the detention of enemy aliens who, if allowed to depart, would strengthen the resources of the enemy. Detention in such a case is only self-protection.

2. On what terms shall it allow them to remain? When the number of enemy aliens in a country was inconsiderable, this was a question of little importance, but in the Great War, it was a problem of great magnitude. On May 15, 1915, the Prime Minister stated in the House of Commons that there were then 19,000 alien enemies interned in England and 40,000 uninterned. The presence of so large a number of alien enemies was a grave menace, and Great Britain finally adopted the policy of interning all male alien enemies of military age. This was done partly for their protection, in order that they might be saved from attacks due to resentment provoked by the German air raids on English watering places, the use of poison gas and such acts as the sinking of the *Lusitania*. Germany and Austria detained British and French males of military age. In the United States the number of enemy aliens was enormous, but comparatively few of them were interned. They were required to register however and their freedom of movement was greatly restricted.

The practice of allowing enemy aliens to remain so long as they conduct themselves properly seems to have originated about 1756, when England accorded such permission to French citizens then in the country. Prior to that time it seems to have been expected that they would depart soon after the outbreak of war, and the time within which they must do so was fixed by statute and by treaty. By the Statute of the Staple, 27 Ed. III, St. 2 c. 17, foreign enemy merchants were allowed forty days within which to depart with their goods. The period allowed by treaty varied from three months to a year. Those who remained beyond the stipulated period must submit to whatever police measures the territorial authorities deemed necessary.

Internment is a war measure and an interned alien is a prisoner of war, *The King v. Superintendent of Vine Street Police Station* (1915), L. R. [1916] 1 K. B. 268. Internment does not necessarily deprive an alien enemy of civil rights which he would otherwise enjoy. A contract of agency made by a resident alien enemy before the outbreak of war is not terminated by his internment, *Nordman v. Rayner and Sturges* (1916), 33 T. L. R. 87, nor is the trustee of an estate who is interned as a dangerous alien thereby ousted from his trusteeship

although his internment may prevent him from acting, *In re Amsinck's Estate* (1918), 169 N. Y. Supp. 336. See also *DeLacey v. United States* (1918), 249 Fed. 625; *Ex parte Graber* (1918), 247 Fed. 882; *Minotto v. Bradley* (1918), 252 Fed. 600; *Ex parte Franklin* (1918), 253 Fed. 984. In Kansas, where an alien resident who is eligible to naturalization and who has declared his intention to become a citizen may vote, it was held that since an alien enemy cannot be naturalized he loses his right to vote, *State v. Covell* (1918), 103 Kan. 754. On the status of enemy aliens see Hunter, "Alien Rights in the United States in War Time," *Michigan Law Review*, XVII, 33; Picciotto, "Alien Enemy Persons, Firms and Corporations in English Law," *Yale Law Journal*, XXVII, 167; Page, *War and Alien Enemies*; McNair, *Essays and Lectures upon Some Legal Effects of War*; Garner, *International Law and the World War*; Cobbett, *Cases and Opinions*, II. 45; Bonfils (Fauchille), sec. 1052; Hyde II, 226; Moore, *Digest*, IV, 128; VII, 191.

SECTION 4. THE EFFECT OF WAR ON TREATIES BETWEEN BELLIGERENTS.

THE SOCIETY FOR THE PROPAGATION OF THE GOSPEL IN FOREIGN PARTS v. THE TOWN OF NEW-HAVEN, AND WILLIAM WHEELER.

SUPREME COURT OF THE UNITED STATES. 1823.
8 Wheaton, 464.

This case came before the Court upon a certificate of a division in opinion of the Judges of the Circuit Court for the District of Vermont. It was an action of ejectment, brought by the plaintiffs against the defendants, in that Court. . . . By a charter granted by William III . . . a number of persons, subjects of England . . . were incorporated by the name of "The Society for the Propagation of the Gospel in Foreign Parts" . . . The corporation has ever since existed, and now exists, as an organized body politic and corporate, in England, all the members thereof being subjects of the king of Great Britain. On the 2d of November, 1761, a grant was made by the governor of the province of New Hampshire, in the name of the king, by which a certain tract of land . . . so granted, was to be incorporated into a town, by the name of New-Haven, and to be divided into sixty-eight shares, one of which was granted to "The Society for the Propagation of the Gospel in Foreign Parts." . . . On the 30th of October, 1794, the Leg-

islature of Vermont passed an act, declaring that the rights to land in that State, granted under the authority of the British government previous to the revolution, to "The Society for the Propagation of the Gospel in Foreign Parts," were thereby granted severally to the respective towns in which such lands lay. . . . Under this law, the selectmen of the town of New-Haven executed a perpetual lease of a part of the demanded premises, to the defendant, William Wheeler. . . .

MR. JUSTICE WASHINGTON delivered the opinion of the Court:

It has been contended by the counsel for the defendants,

1st. That the capacity of the plaintiffs, as a corporation, to hold lands in Vermont, ceased by, and as a consequence of, the revolution.

2dly. That the society being, in its politic capacity, a foreign corporation, it is incapable of holding land in Vermont, on the ground of alienage; and that its rights are not protected by the treaty of peace.

3dly. That if they were so protected, still the effect of the last war between the United States and Great Britain, was to put an end to that treaty, and, consequently, to rights derived under it, unless they have been revived by the treaty of peace, which was not done. . . .

2. The next question is, was this property protected against forfeiture, for the cause of alienage, or otherwise, by the treaty of peace? This question, as to real estates belonging to British subjects, was finally settled in this Court, in the case of *Orr v. Hodgson* (4 Wheat. Rep. 453), in which it was decided, that the 6th article of the treaty protected the titles of such persons, to lands in the United States, which would have been liable to forfeiture, by escheat, for the cause of alienage, or to confiscation, *jure belli*.

The counsel for the defendants did not controvert this doctrine, so far as it applies to natural persons; but he contends, that the treaty does not, in its terms, embrace corporations existing in England, and that it ought not to be so construed. The words of the 6th article are, "there shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in his person,

liberty or property," &c.

The terms in which this article is expressed are general and unqualified, and we are aware of no rule of interpretation applicable to treaties, or to private contracts, which would authorize the Court to make exceptions by construction, where the parties to the contract have not thought proper to make them. Where the language of the parties is clear of all ambiguity, there is no room for construction. Now, the parties to this treaty have agreed, that there shall be no future confiscations in any case, for the cause stated. How can this Court say, that this is a case where, for the cause stated, or for some other, confiscation may lawfully be decreed? We can discover no sound reason why a corporation existing in England may not as well hold real property in the United States, as ordinary trustees for charitable, or other purposes; or as natural persons for their own use. We have seen, that the exemption of either, or all of those persons, from the jurisdiction of the Courts of the State where the property lies, affords no such reason.

It is said, that a corporation cannot hold lands, except by permission of the sovereign authority. But this corporation did hold the land in question, by permission of the sovereign authority before, during, and subsequent to the revolution, up to the year 1794, when the Legislature of Vermont granted it to the town of New-Haven; and the only question is, whether this grant was not void by force of the 6th article of the above treaty? We think it was. . . .

But even if it were admitted that the plaintiffs are not within the protection of the treaty, it would not follow, that their right to hold the land in question was divested by the act of 1794, and became vested in the town of New-Haven. At the time when this law was enacted, the plaintiffs, though aliens, had a complete, though defeasible, title to the land, of which they could not be deprived for the cause of alienage, but by an inquest of office; and no grant of the State could, upon the principles of the common law, be valid, until the title of the State was so established. (*Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch's Rep. 503.) Nor is it pretended by the counsel for the defendants, that this doctrine of the common law was changed by any statute law of the State of Vermont, at the time when this land was granted to the town of New-Haven. This case is altogether unlike that of *Smith v. The State of Maryland*, (6 Cranch's Rep. 286,) which turned upon an act of that State,

passed in the year 1780, during the revolutionary war, which declared, that all property within the State, belonging to British subjects, should be seized, and was thereby confiscated to the use of the State; and that the commissioners of confiscated estates should be taken as being in the actual seisin and possession of the estates so confiscated, without any office found, entry, or other act to be done. The law in question passed long after the treaty of 1783, and without confiscating or forfeiting this land, (even if that could be legally done) grants the same to the town of New-Haven.

3. The last question respects the effect of the late war, [the War of 1812] between Great Britain and the United States, upon rights existing under the treaty of peace. Under this head, it is contended by the defendants' counsel, that although the plaintiffs were protected by the treaty of peace, still, the effect of the last war was to put an end to that treaty, and, consequently, to civil rights derived under it, unless they had been revived and preserved by the treaty of Ghent.

If this argument were to be admitted in all its parts, it nevertheless would not follow, that the plaintiffs are not entitled to a judgment on this special verdict. The defendants claim title to the land in controversy solely under the act of 1794, stated in the verdict, and contend, that by force of that law, the title of the plaintiffs was devested. But if the Court has been correct in its opinion upon the first two points, it will follow, that the above act was utterly void, being passed in contravention of the treaty of peace, which, in this respect, is to be considered as the supreme law. Remove that law, then, out of the case, and the title of the plaintiffs, confirmed by the treaty of 1794, remains unaffected by the last war, it not appearing from the verdict, that the land was confiscated, or the plaintiffs' title in any way devested, during the war, or since, by office found, or even by any legislative act.

But there is a still more decisive answer to this objection, which is, that the termination of a treaty cannot divest rights of property already vested under it.

If real estate be purchased or secured under a treaty, it would be most mischievous to admit, that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed, that rights of

property already vested during its existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests.

But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

We think, therefore, that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

A majority of the Court is of opinion, that judgment upon this special verdict ought to be given for the plaintiffs, which opinion is to be certified to the Circuit Court.

Certificate for the plaintiffs.

SARA E. TECHT, Respondent v. ELIZABETH L. HUGHES,
Appellant.

COURT OF APPEALS OF NEW YORK. 1920.
229 New York, 222.

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 30, 1920, affirming an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for partition of real property.

The following question was certified: "Has the plaintiff herein an estate of inheritance in the real property sought to be partitioned in this action?" . . .

CARDOZO, J. James J. Hannigan, a citizen of the United States, died intestate on December 27, 1917, seized in fee simple of real estate in the city of New York. Two daughters, the plaintiff, Sara E. Techt, and the defendant, Elizabeth L. Hughes, survived him. In November, 1911, the plaintiff became the wife of Frederick E. Techt, a resident of the United States, but a citizen of Austria-Hungary. On December 7, 1917, twenty days before the death of plaintiff's father, war was declared between Austria-Hungary and the United States. The record contains a concession that neither the plaintiff nor her husband has been interned, nor has the loyalty of either been questioned by the government of state or nation, and that both, remaining residents of the United States, have kept the peace and obeyed the laws. The plaintiff's capacity on December 27, 1917, to acquire title by descent is the question to be determined. . . .

The plaintiff is indisputably an alien. Congress has enacted that "any American woman who marries a foreigner shall take the nationality of her husband" (Act of March 2, 1907, ch. 2534, 34 Stat. 1229). . . . Marriage to an alien is voluntary expatriation. The plaintiff is in the same position as if letters of naturalization had been issued to her in Austria. She is in the same position as her husband. She is without capacity to inherit unless statute or treaty has removed the disability.

Both statute and treaty are invoked in her behalf. The statute says that "a citizen of the United States is capable of holding real property within this state, and of taking the same by descent, devise or purchase", and that "alien friends are em-

powered to take, hold, transmit and dispose of real property within this state in the same manner as native born citizens, and their heirs and devisees take in the same manner as citizens" (Real Prop. Law, sec. 10, as amended by L. 1913, ch. 152; Consol. Laws, chap. 50). Alien enemies, therefore, have such rights and such only as were theirs at common law. The treaty says that "where, on the death of any person holding real property, or property not personal, within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of two years to sell the same; which term may be reasonably prolonged, according to circumstances; and to withdraw the proceeds thereof, without molestation, and exempt from any other charges than those which may be imposed in like cases upon the inhabitants of the country from which such proceeds may be withdrawn" (Art. II of Convention between United States and Austria, concluded May 8, 1848, and proclaimed October 23, 1850; 9 Stat. 944).

[The learned judge decided, contrary to the decisions of the lower tribunals reported in 176 N. Y. S. 356 and 177 N. Y. S. 420, that since the plaintiff was a subject of a foreign state at war with the United States, she must be an alien enemy, and hence unable, under the New York statute, to receive an inheritance of land.]

The support of the statute failing, there remains the question of the treaty. The treaty, if in force, is the supreme law of the land (U. S. Const. art. 6) and supersedes all local laws inconsistent with its terms. . . .

The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older writers sometimes said that treaties ended *ipso facto* when war came (3 Phillimore Int. L. 794). The writers of our own time reject these sweeping statements (2 Oppenheim, Int. L. sec. 99; Hall, Int. L. 398, 401; Fiore, Int. L. (Borchard's Transl.) sec. 845). International law today does not preserve treaties or annul them regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules. When it attempts to do more, it finds that there is neither unanimity of opinion nor uniformity of practice. "The whole

question remains as yet unsettled" (Oppenheim, *supra*). This does not mean, of course, that there are not some classes of treaties about which there is general agreement. Treaties of alliance fall. Treaties of boundary or cession, "dispositive" or "transitory" conventions, survive (Hall, Int. L. pp. 398, 401; Westlake, Int. L. II, 34; Oppenheim, *supra*). So, of course, do treaties which regulate the conduct of hostilities (Hall, *supra*; 5 Moore Dig. Int. L. 372; Society for Propagation of the Gospel v. Town of New Haven, 8 Wheat. 464, 494). Intention in such circumstances is clear. These instances do not represent distinct and final principles. They are illustrations of the same principle. They are applications of a standard. When I ask what the principle or standard is, and endeavor to extract it from the long chapters in the books, I get this, and nothing more, that provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected. "Treaties lose their efficacy in war only if their execution is incompatible with war. *Les traités ne perdent leur efficacité en temps de guerre que si leur exécution est incompatible avec la guerre elle-même*" (Bluntschli, *Droit International Codifié*, sec. 538). That in substance was Kent's view, here as often in advance of the thought of his day. "All those duties of which the exercise is not necessarily suspended by the war, subsist in their full force. The obligation of keeping faith is so far from ceasing in time of war, that its efficacy becomes increased, from the increased necessity of it" (1 Kent, Comm. p. 176). That, also, more recently is the conclusion embodied by the Institute of International Law in the rules voted at Christiania in 1912 which defined the effect of war on International Conventions. In these rules, some classes of treaties are dealt with specially and apart. Treaties of alliance, those which establish a protectorate or a sphere of influence, and generally treaties of a political nature, are, it is said, dissolved. Dissolved, too, are treaties which have relation to the cause of war. But the general principle is declared that treaties which it is reasonably practicable to execute after the outbreak of hostilities, must be observed then as in the past. The belligerents are at liberty to disregard them only to the extent and for the time required by the necessities of war. "*Les traités restés en vigueur et dont l'exécution demeure, malgré les hostilités, pratiquement possible, doivent être observés comme par le passé. Les Etats belligérants ne peuvent s'en dispenser que dans la mesure et pour le temps commandés par*

les nécessités de la guerre" (*Institut de Droit International, Annuaire*, 1912, p. 648; Scott, Resolutions of the Institute of Int. Law, p. 172. Cf. Hall, Int. Law (7th ed.), 399; 2 Westlake, Int. L. p. 35; 2 Oppenheim, Int. L. sec. 99, 276).

This, I think, is the principle which must guide the judicial department of the government when called upon to determine during the progress of a war whether a treaty shall be observed in the absence of some declaration by the political departments of the government that it has been suspended or annulled. A treaty has a twofold aspect. In its primary operation, it is a compact between independent states. In its secondary operation, it is a source of private rights for individuals within states (Head Money Cases, 112 U. S. 580, 598). Granting that the termination of the compact involves the termination of the rights, it does not follow because there is a privilege to rescind that the privilege has been exercised. The question is not what states may do after war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have done. "Where the department authorized to annul a voidable treaty shall deem it most conducive to the national interest that it should longer continue to be obeyed and observed, no right can be incident to the judiciary to declare it void in a single instance" (Jay Ch. J., in *Jones v. Walker*, 2 Paine, 688, 701. Cf. *The Legal Nature of Treaties*, vol. 10, *American Journal of Int. Law* (1916), pp. 721, 722). President and senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (*Fong Yue Ting v. U. S.*, 149 U. S. 698). The treaty of peace itself may set up new relations, and terminate earlier compacts either tacitly or expressly. The proposed treaties with Germany and Austria give the victorious powers the privilege of choosing the treaties which are to be kept in force or abrogated. But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, *en bloc*. Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency

of war, and hence presumably intended to be limited to time of peace. The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act. "*Le traité tombe pour le tout quand il présente le caractère d'un acte indivisible*" (Rules of the Institute of Int. L. *supra*). To determine whether it has this character, it is not enough to consider its name or label. No general formula suffices. We must consult in each case the nature and purpose of the specific articles involved. "*Il faut. . . examiner dans chaque cas, si la guerre constitue par sa nature même un obstacle à l'exécution du traité*" (Bluntschli, *supra*).

I find nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of the war in the enforcement of this treaty so as to sustain the plaintiff's title. We do not confiscate the lands or goods of the stranger within our gates. If we permit him to remain, he is free during good behavior to buy property and sell it (Trading with Enemy Act of Oct. 6, 1917; 40 St. 411, ch. 106). He is to be "undisturbed in the peaceful pursuit" of his life and occupation, and "accorded the consideration due to all peaceful and law-abiding persons" (President's Proclamation of Dec. 11, 1917). If we require him to depart, we assure to him, for the recovery, disposal and removal of his goods and effects and for his departure, the full time stipulated by any treaty then in force between the United States and the hostile nation of which he is a subject; and where no such treaty is in force, such time as may be declared by the President to be consistent with the public safety and the dictates of humanity and national hospitality (U. S. R. S. sec. 4068, re-enacting the act of July 6, 1798). A public policy not outraged by purchase will not be outraged by inheritance. The plaintiff is a resident; but even if she were a non-resident, and were within the hostile territory, the policy of the nation would not divest her of the title whether acquired before the war or later. Custody would then be assumed by the alien property custodian. The proceeds of the property, in the event of sale, would be kept within the jurisdiction. Title, however, would be unchanged, in default of the later exercise by Congress of the power of confiscation (40 Stat. ch. 106, pp. 416, 424), now seldom brought into play in the practice of enlightened nations (2 Westlake, Int. L. 46, 47; Brown v. U. S., 8 Cranch, 110). Since the argument of this appeal, Congress

has already directed, in advance of any treaty of peace, that property in the hands of the custodian shall be returned in certain classes of cases to its owners, and in particular where the owner is a woman who at the time of her marriage was a native-born citizen of the United States and prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary (Act of June 5, 1920, amending sec. 9 of the act of Oct. 6, 1917). It follows that even in its application to aliens in hostile territory, the maintenance of this treaty is in harmony with the nation's policy and consistent with the nation's welfare. To the extent that there is conflict between the treaty and the statute (40 Stat. ch. 106), we have the same situation that arises whenever there is an implied repeal of one law by another. To the extent that they are in harmony, both are still in force. There is in truth no conflict here except in points of detail. In fundamental principle and purpose, the treaty remains untouched by later legislation. In keeping it alive, we uphold the policy of the nation, revealed in acts of Congress and proclamations of the President, "to conduct ourselves as belligerents in a high spirit of right and fairness" (President Wilson's Address to Congress, April 2, 1917; Scott, *Diplomatic Correspondence between United States and Germany*, p. 324), without hatred of race and without taint of self-seeking.

I do not overlook the statements which may be found here and there in the works of authors of distinction (Hall, *supra*; Halleck Int. L. (4th ed.) 314; Wheaton, Int. L. (5th ed.) 377) that treaties of commerce and navigation are to be ranked in the class of treaties which war abrogates or at least suspends. Commerce is friendly intercourse. Friendly intercourse between nations is impossible in war. Therefore, treaties regulating such intercourse are not operative in war. But stipulations do not touch commerce because they happen to be embodied in a treaty which is styled one to regulate or encourage commerce. We must be on our guard against being misled by labels. Bluntschli's warning, already quoted, reminds us that the nature and not the name of covenants determines whether they shall be disregarded or observed. There is a line of division, fundamental in importance, which separates stipulations touching commerce between nations from those touching the tenure of land within the territories of nations (Cf. The Convention "as to tenure and disposition of real and personal property" between the U. S. & Great Britain dated March 2, 1899). Restrictions

upon ownership of land by aliens have a history all their own, unrelated altogether to restrictions upon trade (*Kershaw v. Kelsey, supra*; *Fairfax v. Hunter, supra*). When removed, they cease to exist for enemies as well as friends, unless the statute removing them enforces a distinction (*Kershaw v. Kelsey, Fairfax v. Hunter, supra*). More than that, the removal, when effected by treaty, gives reciprocal privileges to the subjects of each state, and is thus of value to one side as much as to the other. For this reason, the inference is a strong one, as was pointed out by the Master of the Rolls in *Sutton v. Sutton* (1 Russ & M. 664, 675) that the privileges, unless expressly revoked, are intended to endure (Cf. 2 Westlake, p. 33; also Halleck, Int. L., *supra*). There, as in *Society for the Propagation of the Gospel v. Town of New Haven* (8 Wheat. 464, 494), the treaty of 1794 between the United States and England protecting the citizens of each in the enjoyment of their landed property, was held not to have been abrogated by the war of 1812. Undoubtedly there is a distinction between those cases and this in that there the rights had become vested before the outbreak of the war. None the less, alike in reasoning and in conclusion, they have their value and significance. If stipulations governing the tenure of land survive the stress of war though contained in a treaty which is described as one of amity, it is not perceived why they may not also survive though contained in a treaty which is described as one of commerce. In preserving the right of inheritance for citizens of Austria when the land inherited is here, we preserve the same right for our citizens when the land inherited is there (*Brown v. U. S.*, 8 Cranch 110, 129). Congress has not yet commanded us, and the exigencies of war, as I view them, do not constrain us, to throw these benefits away.

No one can study the vague and wavering statements of treatise and decision in this field of international law with any feeling of assurance at the end that he has chosen the right path. One looks in vain either for uniformity of doctrine or for scientific accuracy of exposition. There are wise cautions for the statesman. There are few precepts for the judge. All the more, in this uncertainty, I am impelled to the belief that until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusal to the needs of the occasion; that they are not bound by any rigid formula to nullify the whole or nothing; and that in determining whether this treaty survived the coming of war, they are free to make choice

of the conclusion which shall seem the most in keeping with the traditions of the law, the policy of the statutes, the dictates of fair dealing, and the honor of the nation.

The judgment should be affirmed with costs, and the question certified answered in the affirmative.

HISCOCK, Ch. J., CHASE, HOGAN, McLAUGHLIN and CRANE, JJ., concur; ELKUS, J., concurs in result.

Judgment affirmed.

NOTE.—See *The Frau Ilseabe* (1801), 4 C. Robinson, 63; *Carneal v. Banks* (1825), 10 Wheaton, 181; *Sutton v. Sutton* (1830), 1 Russel & Mylne, 663. As to the nature of the treaty of peace of 1783 between Great Britain and the United States, see *M'Ilvaine v. Cox's Lessee* (1808), 4 Cranch, 209; *Harcourt v. Gaillard* (1827), 12 Wheaton, 523. The character of the treaty of 1783 played an important part in the American argument in the North Atlantic Fisheries Arbitration. For further discussion of the subject, see Crandall, *Treaties—Their Making and Enforcement*, sec. 181; Butler, *The Treaty-Making Power of the United States*; Wheaton (Dana), 342, (Phillipson), 368; Pitt Cobbett, *Cases and Opinions*, II. 35; Hyde, II. 91; Bonfilz (Fauchille), sec. 1049; Moore, *Digest*, V. sec. 779, 780.

CHAPTER XII.

ENEMY CHARACTER.

SECTION 1. NATURAL PERSONS.

THE HARMONY.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1800.

2 C. Robinson, 322.

This was one of several American vessels in which a claim had been reserved for part of the cargo, on further proof to be made of the national character of G. W. Murray, who appeared in the original case, as a partner of a house of trade in America, but personally resident in France; restitution had been decreed in the several claims to the house of trade in America, with a reservation of the share of this partner. . . . [It appeared in evidence that G. W. Murray, an American citizen, had gone to France in 1794 to dispose of a cargo belonging to his firm. He remained a year, and after a visit of about six months to America, he returned to France and four years later was still in that country. The court construed this as a continuous residence of six years in France. The claimant argued that these facts did not show a domicile in France.]

SIR W. SCOTT [LORD STOWELL].—This is a question which arises on several parcels of property claimed on behalf of G. W. Murray; and it is in all of them a question of residence or domicile, which I have often had occasion to observe, is in itself a question of considerable difficulty, depending on a great variety of circumstances, hardly capable of being defined by any general precise rules: The active spirit of commerce now abroad in the world, still farther increases this difficulty by increasing the variety of local situations, in which the same individual is to be found at no great distance of time; and by that sort of extended

circulation, if I may so call it, by which the same transaction communicates with different countries, as in the present cases, in which the same trading adventures have their origin (perhaps) in America, travel to France, from France to England, from England back to America again, without enabling us to assign accurately the exact legal effect of the local character of every particular portion of this divided transaction.

In deciding such cases, the necessary freedom of commerce imposes likewise the duty of a particular attention and delicacy; and strict principle of law must not be pressed too eagerly against it; and I have before had occasion to remark, that the particular situation of America, in respect to distance, seems still more particularly to entitle the merchants of that country to some favourable distinctions. They live at a great distance from Europe; they have not the same open and ready constant correspondence with individuals of the several nations of Europe, that these persons have with each other; they are on that very account more likely to have their mercantile confidence in Europe abused, and therefore to have more frequent calls for a personal attendance to their own concerns; and it is to be expected that when the necessity of their affairs calls them across the Atlantic, they should make rather a longer stay in the country where they are called, than foreign merchants who step from a neighboring country in Europe, to which every day offers a convenient opportunity of return. . . .

Of the few principles that can be laid down generally, I may venture to hold, that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive; it is not unfrequently said, that if a person comes only for a special purpose, *that* shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that *may, probably, or does actually* detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him the whole of his life. A man comes here to follow a lawsuit; it may happen, and indeed is often used as a ground of vulgar and unfounded reproach, (unfounded as a matter of just reproach though the fact may be true), on the laws of this country, that it may last as long as himself. Some suits are famous in our juridical his-

tory for having even outlived generations of suitors. I cannot but think that against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case, that other purposes forced themselves upon him and mixed themselves with his original design and impressed upon him the character of the country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes, and other means, to the strength of that country, I am of opinion, that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original, and sole purposes of a long continued residence. There is a time which will estop such a plea; no rule can fix the time *a priori*, but such a time there *must* be.

In proof of the efficacy of mere time, it is not impertinent to remark, that the same quantity of business, which would not fix a domicile in a certain space of time, would nevertheless have that effect, if distributed over a large space of time. Suppose an American comes to Europe, with six contemporary cargoes, of which he had the present care and management, meaning to return to America immediately; they would form a different case from that, of the same American, coming to any particular country of Europe, with one cargo, and fixing himself there, to receive five remaining cargoes, one in each year successively. I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio, of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicile. . . . [The learned judge here makes an elaborate examination of the evidence as to Murray's residence in France, and finds that the facts show a domicile established in that country.]

I feel myself under the necessity . . . of condemning his share of the property in these several cargoes.

THE INDIAN CHIEF.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1801.

3 C. Robinson, 12.

[The claimant Johnson was an American citizen long resident in London. While the vessel in question was on a voyage from Batavia, a Dutch colony, to Hamburg, her owner Johnson determined to return to America, and did actually leave England September 9, 1797. The vessel was captured November 1, 1797. The material point to be determined was whether or not Johnson had lost his British domicile.]

SIR W. SCOTT [LORD STOWELL]:—This is the case of a ship seized in the port of Cowes, where she came to receive orders respecting the delivery of a cargo taken in at Batavia, with a professed original intention of proceeding to Hamburg, but on coming into this country for particular orders, the ship and cargo were seized in port. It does not appear clear to the Court, that it might not be a cargo intended to be delivered in this country, as many such cargoes have been, under the Dutch property act: I mention this to meet an observation that has been thrown out, “that it is doubtful whether the ship might not be confiscable on the ground of being a neutral ship coming from a colony of the enemy, not to her own ports or the ports of this country.” I cannot assume it as a demonstrated fact in the case, that the cargo was to be delivered at Hamburg. The vessel sailed in 1795, and as an American ship with an American pass, and all American documents; but nevertheless if the owner really resided here, such papers could not protect his vessel: if the owner was resident in England, and the voyage such as an English merchant could not engage in, an American residing here, and carrying on trade, could not protect his ship merely by putting American documents on board; his interest must stand or fall according to the determination which the Court shall make on the national character of such a person.

There are two positions which are not to be controverted; that Mr. Johnson is an American generally by birth, which is the circumstance that first impresses itself on the mind of the Court; and also by the part which he took on the breaking out of the American war. He came hither when both countries were open to him; but on the breaking out of hostilities, he made his elec-

tion which country he would adhere to, and in consequence thereof went to France. . . . He came however to this country in 1783, and engaged in trade, and has resided in this country till 1797; during that time he was undoubtedly to be considered as an English trader; for no position is more established than this, that if a person goes into another country, and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country; I should therefore have no doubt in pronouncing that Mr. Johnson was to be considered as a merchant of this country, at the time of sailing of this vessel on her outward voyage. . . .

Now there can be no doubt that if Mr. Johnson had continued where he was at the time of sailing, if he had remained resident in England, it must be considered as a British transaction; and therefore a criminal transaction, on the common principle that it is illegal in any person owing an allegiance, though temporary, to trade with the public enemy. But it is pleaded that he had quitted this country before the capture, and that he had done this in consequence of an intention he had formed of removing much earlier, but that he had been prevented by obstacles that obstructed his wish: to this effect the letter of March, 1797 is exhibited, which must have been preceded by private correspondence, and application to some of his creditors. It does, I think, breathe strong expressions of intention, and of an ardent desire to get over the restraint that alone detained him; and it affords conclusive reason to believe that if he had been a free man, and at liberty to go where he pleased, he would have removed long before; and that he was detained here as a hostage, as he describes himself, to his creditors, on motives of honor creditable to his character. On the 9th of September 1797 he did actually retire; of the sincerity of his quitting this country there can hardly be a doubt entertained; it is almost impossible to represent stronger or more natural grounds for such a measure; and I do not think the Court runs any risk of encountering a fraudulent pretension, put forward to meet the circumstances of the moment, without anything of an original and *bona fide* intention at the bottom of it. . . .

The ship arrives a few weeks after his departure, and taking it to be clear, that the national character of Mr. Johnson as a British merchant was founded in residence only, that it was acquired by residence, and rested on that circumstance alone; it must be held that from the moment he turns his back on the

country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American: The character that is gained by residence ceases by residence: It is an adventitious character which no longer adheres to him, from the moment that he puts himself in motion, *bona fide*, to quit the country, *sine animo revertendi*. The Courts that have to apply this principle, have applied it both ways, unfavourably in some cases, and favourably in others. This man had actually quitted the country. Stronger was the case of Mr. Curtissos; he was a British-born subject, that had been resident in Surinam and St. Eustatius, and had left those settlements with an intention of returning to this country; but he had got no farther than Holland, the mother country of those settlements, when the war broke out. It was determined by the Lords of Appeal, that he was *in itinere*, that he had put himself in motion, and was in pursuit of his native British character: and as such, he was held to be entitled to the restitution of his property. So here, this gentleman was in actual pursuit of his American character; and, I think, there can be no doubt that his native character was strongly and substantially revived, not occasionally, nor colourably, for the mere purpose of the present claim; and therefore I shall restore the ship.

THE DERFFLINGER, (No 1).

BRITISH PRIZE COURT FOR EGYPT. 1916.

1 British and Colonial Prize Cases, 386.

CATOR, P. This is a claim made by Mr. H. E. Wolf, a German subject, for the release of a number of cases of porcelain, curios, and other private effects, consigned by him from Hong Kong to a German firm of forwarding agents in Bremen, who had instructions to send them to Mr. Wolf's home in Stuttgart.

Mr. Wolf is employed in the Chinese Maritime Customs at Shanghai, but no special claim is made on account of his employment, and we are to deal with him as a private gentleman forming part of the German community in Shanghai, and no doubt registered at his Consulate as a German subject resident in China. His affidavit declares and emphasises that the goods

in question are his private effects intended for private use in his own home in Germany.

On these facts counsel for the claimant has made a very praise-worthy effort to parry the claim of the Crown for confiscation, and has cited a mass of authority to support his contentions. Put shortly his argument is as follows: The principle of commercial domicile which has been elaborated in our Prize Courts applies to private residents as well as to merchants. This domicile in the case of Mr. Wolf is China. China is a neutral country and Mr. Wolf must be treated as a neutral by the Prize Court, and as such is entitled to have his property returned to him even though he has consigned it to himself in Germany. . . .

The much-quoted case of *The Indian Chief* (1800), 3 C. Rob. 12, 1 Eng. P. C. 251, decided by Lord Stowell, is directly in point. We are concerned only with the second part of the judgment—a part which unfortunately has not found a place in the English Prize Cases. The question turned upon the position of Europeans in Oriental countries, and on this subject Lord Stowell says, "In the East, from the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were—'*Doris amara suam non intermiscuit undam*'; not acquiring any national character under the general sovereignty of the country, and not trading under any recognized authority of their own original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on their trade." (3 C. Rob., at p. 29.)

In those days factories, as they were called, still flourished in the Orient. A factory was a community of Europeans established in a foreign country for the purpose of trade, yet owing no allegiance to the ruler of the soil and not much controlled by any other. Although grouped under the protection of one flag, its members might consist of traders belonging to different nations. An Englishman, for instance, might attach himself to a Dutch factory, and if he did so his trade domicile would for the purpose of a British Prize Court be reckoned Dutch. Since that time the grouping has undergone a change. Communities which in those days were not trading under any recognized authority of their own original country have now sorted them-

selves out into communities of different nations, definitely controlled by their home Governments, which legislate for them in virtue of rights acquired by custom or definitely conceded by native potentates. The trading bond has given way to one of nationality. But allowing for this difference, the words of Lord Stowell are just as applicable in these days as they were more than a hundred years ago. The waters of Alpheus still flow undefiled, and where European Powers enjoy the privilege of ex-territorial jurisdiction their subjects never lose their native character. Each community continues its distinctive existence, governed by its own consuls and subject to the laws of its mother country. . . . There still exist countries where, owing to fundamental differences in race and religion, Europeans do not merge in the general life of the native inhabitants, but keep themselves apart in separate communities; and where such separation is sanctioned by the exercise of ex-territorial authority I am of opinion that it is impossible for any individual to acquire a trade domicile other than that of the country to which he owes allegiance.

Mr. Wolf is a German subject and a member of the German community in Shanghai, and his domicile for the purpose of these proceedings must be taken to be German. His goods form part of the cargo of an enemy ship which has been confiscated to the Crown, and they must be condemned in like manner. There will be an order for sale in the usual terms.

THE ANGLO-MEXICAN.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1917.
Law Reports [1918] A. C. 422.

Appeal from a judgment of the President of the Admiralty Division (in Prize). . . .

LORD PARKER OF WADDINGTON. The goods in respect of which this appeal arises were shipped at Savannah, U. S. A., shortly before the outbreak of the war, on the British steamship Anglo-Mexican. They were shipped by and at all material times belonged to Reis & Co., a German firm with its head office at Friedrichsfeld in Baden, but with branch offices at Boston, U.

S. A., and at Salford in the United Kingdom. The firm consisted of four partners, Edwin Reis and Ludwig Reis, German subjects residing and carrying on the firm's business at Friedrichsfeld; K. B. Straus, a German by birth, but naturalized and resident in the United Kingdom, who was in charge of the Salford office; and the respondent Richard Mayer, also a German by birth, but naturalized and resident in the U. S. A., who was in charge of the Boston office. Richard Mayer's interest in the partnership concern was one-fifth share. The President has ordered the release to him of one-fifth of the goods in question or their proceeds, on the ground that he was a neutral subject domiciled and resident in a neutral country, though a partner in a German firm, and that the goods were shipped before the outbreak of the war. The Crown is appealing from this order.

The principles which ought to govern cases such as the present are not wholly free from doubt. It appears, however, reasonably certain that the question whether a particular individual ought to be regarded as an enemy or otherwise depends *prima facie* on his domicile, and domicile is, according to international law, a matter of inference from residence. Thus, if a neutral subject is at the commencement of or during the war to all appearance permanently resident in an enemy country, he will be regarded as an enemy. By taking up his permanent residence in a country other than that of his birth, he submits himself to and takes the benefit of the laws of that country, and in effect becomes one of its subjects. If, therefore, while this state of things continues, goods belonging to him are seized as prize, such goods will *prima facie* be treated as enemy goods. But an acquired domicile may be abandoned, and if prior to the actual capture the owner has already done some unequivocal act indicating an abandonment of his acquired domicile in the country of the enemy, the goods will *prima facie* be treated as belonging to a neutral. It has been sometimes urged that neutrals, resident in a country which by the outbreak of hostilities becomes an enemy country, ought to be allowed a reasonable time after such outbreak to elect whether they will abandon or retain their acquired domicile. This point was discussed in *The Venus*, 8 Cranch, 253. In that case the majority of the judges of the Supreme Court of the United States decided against allowing any interval for election. It was not, they thought, desirable that a neutral after the outbreak of hostilities should be able for any interval, however short, to sit, as it were, on the fence ready to

come down on either side according as it might prove to his advantage. The English authorities are not conclusive one way or the other. The point does not, however, fall to be determined on this appeal, for the respondent was not at the outbreak of hostilities permanently resident in Germany. His domicil was in the United States.

Again, it seems clear that a neutral wherever resident may, if he owns or is a partner in a house of business trading in or from an enemy country, be properly deemed an enemy in respect of his property or interest in such business. He acquires by virtue of the business a commercial domicil in the country in or from which the business is carried on, and this commercial domicil, though it does not affect his property generally, will affect the assets of the business house or his interest therein with an enemy character. But a neutral having such a commercial domicil in a country which becomes an enemy country on the outbreak of hostilities ought, according to the views taken by British Prize Courts, to be allowed a reasonable interval during which he may discontinue or dissociate himself from the business in question. If he has done this prior to the capture at sea of any goods belonging to the business, such goods or his interest in them will not be confiscable. If he has not done this prior to the capture, but the Court is of opinion that a reasonable interval for this purpose had not then already elapsed, the Court will take notice of what he has done in that behalf since the capture, or will in a proper case even let the question of condemnation stand over to enable further action to be taken. If, on the other hand, he has already had a reasonable opportunity of discontinuing or dissociating himself from the business in the enemy country and has failed to take advantage of it, or if he has done some unequivocal act indicating an intention to continue or retain his interest in such business, the goods or his interest therein will be condemned as lawful prize.

It may happen that a neutral or the firm in which he is a partner has, besides the house of business in the enemy country, branch houses in other countries. In such a case nice questions may arise as to whether the captured goods ought properly to be regarded as appertaining to the enemy house or to one or other of the branch houses. A question of this sort came before their Lordships' Board in the case of *The Lützow*, [1918] A. C. 435, in which judgment is about to be given, and the original claim put forward on the respondent's behalf in the present case

appears to have been framed on the contention that the goods now in question appertained to the American or to the English branch of the business of Reis & Co., and not to their German branch. Had this claim been made out, the interest therein of the respondent would not have been confiscable as enemy property. The claim, however, in this form was abandoned in the Court below, it being admitted that the goods in question could not be regarded otherwise than as appertaining to the German house.

In support of the views above indicated their Lordships refer to *The Gerasimo*, 11 Moo. P. C. 96, where Lord Kingsdown, in delivering the opinion of the Board, states the general principle as follows: "The national character of a trader is to be decided for the purposes of the trade by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the Power under whose dominion he carries it on and, of course, as an enemy of those with whom that Power is at war."

Their Lordships also refer to the following important passage in Mr. Justice Story's *Notes* (*Pratt's Story*, at pp. 60-61): "In general, a neutral merchant trading in the ordinary manner with a belligerent country, does not, by the mere accident of his having a stationed agent there, contract the character of the enemy. But it is otherwise, if he be not engaged in trade upon the ordinary footing of a neutral merchant, but as a privileged trader of the enemy, for then it is in effect a hostile trade. So if the agency carry on a trade from the hostile country which is not clearly neutral, *and if a person be a partner in a house of trade in an enemy's country*, he is, as to the concerns and trade of that house, deemed an enemy; and his share is liable to confiscation as such, notwithstanding his own residence is in a neutral country, for the domicile of the house is considered in this respect as the domicile of the partners. But if he has a house of trade in a neutral country, he has not the benefit of the same principle; for if his own personal residence be in the hostile country, his share in the property of the neutral house is liable to condemnation. However, where a neutral is engaged in peace, in a house of trade in the enemy's country, his property, so en-

gaged in the house is not, at the commencement of the war, confiscated; but if he continues in the house after the knowledge of the war, it is liable, as above stated, to confiscation. It is a settled principle that the traffic alone, independent of residence, will, in some cases, confer a hostile character on the individual."

If the principles thus laid down be applied to the facts of the present case, it would appear that the interest of Richard Mayer in the goods in question ought to be condemned by reason of his commercial domicile in Germany. He might, it is true, have avoided this result by taking steps within the reasonable interval allowed by law to dissociate himself from the enemy firm in which he was a partner. But it is not suggested that he took any such step or that such reasonable interval has not elapsed. On the contrary, it is admitted that since the outbreak of the war he has been actively engaged in the affairs of Reis & Co. in Germany.

The contention of the respondent is based entirely on the following consideration: The goods in question were shipped in time of peace. There could therefore be no enemy taint affecting them when the war broke out. Since the outbreak nothing has been done in respect of them by virtue of which they could have acquired an enemy character. The criterion of character is therefore personal domicile. It will be observed that this contention with regard to goods at sea at the commencement of a war entirely ignores the doctrine of commercial domicile as determining the character of the goods. It leaves the character of such goods to depend on personal domicile, subject to the question whether the owner has done anything to impress upon them or taint them with an enemy character. In other words, it creates an exception to the theory of commercial domicile, and deals with the excepted cases on different principles. Counsel for the respondent was unable to suggest, and their Lordships have been unable to find, any logical justification for such an exception. If it exists at all, it must be attributed, as counsel for the respondent attributed it, to an over-scrupulous desire on the part of our Prize Courts to protect neutral interests. Further, if the exception exists, the rule which allows a reasonable interval in which the neutral owner can discontinue his commercial domicile in the enemy country will be reduced within very narrow limits, if it is not abrogated altogether, for a neutral owner will, by shipping goods after the war, or by otherwise taking part after the war in the affairs of the enemy house of business, have

elected to continue his commercial domicile in the enemy country, and so brought the interval to an end. Nevertheless, the exception is said to be supported by authority, and their Lordships will therefore proceed to consider the several authorities on which reliance is placed.

The three earliest authorities referred to are *The Jacobus Johannes* (1785), *The Osprey* (1795), and *The Nancy* (1798), all of them decided by the Lords Commissioners in Prize Cases. The decisions are unreported, but the printed cases and appendices which were before the Lords Commissioners are preserved in the Admiralty Library, and their Lordships have had access thereto.

In *The Jacobus Johannes* the goods in question belonged to a firm carrying on business in the Dutch island of St. Eustatius. The goods had been shipped from St. Eustatius on December 5, 1780, on board a Dutch vessel bound for Amsterdam and were deliverable at Amsterdam. Hostilities between this country and Holland commenced on December 20, 1780. On February 3, 1781, St. Eustatius was occupied by His Majesty's naval forces. On February 4 the *Jacobus Johannes* with its cargo was captured at sea. The firm which owned the goods consisted of two partners, namely, Haason, a Danish subject, but domiciled in St. Eustatius, where he carried on the business of the firm, and Ernst, also a Danish subject, but domiciled at Copenhagen. Shortly after the occupation of the island by the British, Haason proceeded to wind up the firm's business and finally left the island in April, 1781. It is to be observed on these facts that Haason's personal domicile being Dutch at the date of capture he was *prima facie*, at any rate, an enemy. If according to the English as well as the American view of international law, he was not entitled to an interval after the commencement of hostilities in which he could abandon his acquired domicile, his share in the goods would in any event be confiscable. If he was entitled to an opportunity of abandoning his acquired domicile, the question would arise whether he had done so within a reasonable time. On the other hand, Ernst, who was domiciled at Copenhagen, could only be regarded as an enemy by virtue of the commercial domicile of the firm, and he was clearly entitled to a reasonable interval in which he might dissociate himself from the firm. The interest of Haason was condemned and that of Ernst released. It does not appear what were the reasons for this decision. It is quite possible that the case turned wholly on per-

sonal domicil, the doctrine of commercial domicil being yet undeveloped. It is also possible that, in the opinion of the Lords Commissioners, the connection of both partners with an enemy business had in fact been determined within a reasonable interval, and that such determination would justify the release of Ernst's interest, but would not improve the position of Haason, whose personal as well as commercial domicil at the date of capture was Dutch. Under these circumstances their Lordships fail to see how the case can be relied on as an authority for the alleged exception to the general rule.

In *The Osprey* the property in question was a ship employed in the Southern Whale Fishery with her cargo of whale-oil and whale-bone. She had left Dunkirk on her whaling adventure on May 24, 1792. War broke out between this country and France in February, 1793, and on May 15, 1793, the ship and her cargo were seized as prize. The ship belonged to three persons, all subjects of the United States of America, two of whom were domiciled at Dunkirk, and the third, one Rodman, was domiciled at Nantucket. The cargo belonged to the owners of the ship and the master and crew in shares, which were apparently settled by the custom of the fishery. Among the crew were other subjects of the United States; no doubt domiciled in America. The Lords Commissioners ordered a release of Rodman's share in the ship and cargo and of the shares in the cargo of the American members of the crew. The reasons for this decision are again unknown, but, as in the case of *The Jacobus Johannes*, the case may have turned entirely on personal domicil. It should be observed that there was really no commercial domicil in an enemy country, the whole adventure being a high seas adventure. Further, the whole adventure, except the return voyage, had apparently been carried out during peace, and had come to an end when the ship and cargo were seized as prize. There was in fact nothing from which, when the war broke out, the neutrals interested could dissociate themselves. Again their Lordships fail to see how this case can be relied upon as an authority for the alleged exception to the general rule.

In *The Nancy* the goods in question had been shipped early in July, 1793, a state of open war having existed between this country and France since February 14, 1793. The shipment was made at Port-au-Prince in the island of St. Domingo by Stephen Zaccharie, the cargo being consigned to Zaccharie, Coopman & Co., of Baltimore. It was not quite clear on the evidence

whether the goods belonged to Stephen Zaccharie, and were delivered to Zaccharie, Coopman & Co. on his account, or whether they belonged to Zaccharie, Coopman & Co. The partners in this firm were Stephen Zaccharie and two others, Coopman and Vochev. Coopman was an American by birth, and Stephen Zaccharie and Vochev, though French by birth, claimed to have been naturalized in the United States. All of them claimed to have an American domicil, but Coopman and Stephen Zaccharie were both of them in St. Domingo at the time of shipment, and also at and after the capture. The judge of first instance released the goods to Stephen Zaccharie, on the ground that they were at the time of capture his property and that he was an American citizen. The Lords Commissioners reversed this decision, and condemned the goods as enemy property. It is not clear to whom they considered the goods to belong, but if they belonged to Stephen Zaccharie it is quite clear that he was at all material times actually trading in enemy territory; and if they belonged to the firm it is equally true that two of the firm were at all material times trading in the enemy country on behalf of the firm. In respect, therefore, of the goods in question there was, whoever was the owner and wherever such owner was personally domiciled, a commercial domicil by virtue of which the goods were confiscable. There could be no question of any reasonable interval for the owner to discontinue or dissociate himself from the trade in the enemy country, for the transaction originated after the outbreak and with full knowledge of the state of war. In this respect the case differed from *The Jacobus Johannes* or *The Osprey*, where the transaction originated in the time of peace. It has even less bearing than these cases on the point at issue.

The three cases of *The Jacobus Johannes*, *The Osprey*, and *The Nancy* were commented upon by Sir William Scott in *The Vigilantia*, 1 C. Rob. 1, 15. After mentioning the *Jacobus Johannes* and *The Osprey*, he says that from these cases a notion had been adopted that the domicil of the parties was that alone to which the Court had a right to resort. From this it appears that, according to the general opinion, both *The Jacobus Johannes* and *The Osprey* had turned entirely on the personal domicil of the claimants, the doctrine of commercial domicil being wholly ignored. But Sir William Scott proceeds to say of *The Nancy* that it had been decided on different principles, the Lords Commissioners distinguishing the former cases on the ground

that they "were cases merely at the commencement of a war; that in the case of a person carrying on trade habitually in the country of the enemy, though not resident there, he should have time to withdraw himself from that commerce; and that it would press too heavily on neutrals, to say, that immediately on the first breaking out of a war, their goods should become subject to confiscation." Sir William Scott adds that it was expressly laid down in *The Nancy* that if a person entered into a house of trade in the enemy country in time of war, or continued that connection during the war, he should not protect himself by mere residence in a neutral country.

Sir William Scott had been counsel for one of the parties in *The Nancy*, and his account of what was said by the Lords Commissioners is no doubt based on personal knowledge. It is reasonably clear, in spite of a slight ambiguity in Sir William Scott's language, that the Lords Commissioners in *The Nancy* distinguished the two earlier cases on the ground that the goods in question in these cases had been shipped before the war, whereas in the case of *The Nancy* the shipment was after the commencement of hostilities. This was a perfectly legitimate ground of distinction, but it is a fallacy to suppose that a judge necessarily approves every case which he distinguishes from that with which he is himself dealing, and a still greater fallacy to suppose that he approves of it on any particular ground. The rule which Sir William Scott states to have been laid down in *The Nancy* is the rule by which an enemy character is imposed on goods by virtue of the commercial domicile of the owner, not a rule which leaves the personal domicile as the criterion of character, subject to a possible enemy taint imposed by the action of the owner. It is stated without exception. If Sir William Scott had considered that the Lords Commissioners were countenancing or even suggesting an exception to the rule, he would certainly have said so, more especially as cases within the exception would fall to be decided on principles independent of commercial domicile.

The President appears to have treated the case above referred to as authorities in the respondent's favour, and says that the doctrines there laid down have been followed by America and this country ever since. He refers in particular to *The Antonia Johanna* (1816), 1 Wheat. 159, *The Friendschaft*, 4 Wheat. 105, *The San Jose Indiano*, 2 Gall. 268, and *The Cheshire*, 3 Wall.

231. These are all of them American authorities, which upon examination appear to support the general principle of the effect of a commercial domicile acquired in an enemy country by a person whose personal domicile is in a neutral country. They do not support the exception to the general principle for which the respondent contends.

In the *Antonia Johanna* (1816), 1 Wheat. 159, the goods in question were held to have been shipped for and on account of a house of trade in the neutral country, and the case therefore fell to be decided on the personal domicile of the partners in the neutral house of trade. In *The Friendschaft*, 4 Wheat. 105, the goods in question belonged to a house of trade established in the enemy country. They had been shipped during the war. The doctrine of commercial domicile is stated by Story J., and the goods were condemned. No exception to the rule is mentioned. In *The San Jose Indiano*, 2 Gall. 268, the authorities on which the doctrine of commercial domicile is based are discussed at some length. The cases of *The Jacobus Johannes*, *The Osprey*, and *The Nancy* are mentioned, but not as creating any exception to the general doctrine. Similarly in *The Cheshire*, 3 Wall. 231, there is a statement of the general doctrine, but no allusion to any possible exception.

With regard to the British authorities, their Lordships have failed to find any authority for the respondent's contention, unless it be *The Jacobus Johannes*, *The Osprey*, and *The Nancy*, and Sir William Scott's comments on them in *The Vigilantia*, 1 C. Rob. 1, 15.

In their Lordships' opinion these cases and comments afford a very slender support for the contention in question. It appears from the facts in each case that the point did not necessarily arise for decision. Each case is explicable without it having been raised or decided. The whole superstructure of the respondent's argument is ultimately based on what is said by Sir William Scott in *The Vigilantia*, 1 C. Rob. 1, 15. But as above indicated, this is quite consistent with the general rule deduced from the other authorities.

Under these circumstances their Lordships have come to the conclusion that there is no such exception to the general rule as that for which the respondent contends. A neutral owning or being a partner in a house of business in an enemy country has a commercial domicile in that country. This commercial domicile imposes an enemy character on his property or interest in such

house of business. There is no question of any particular act on his part by which any particular goods belonging to him or his interest in any particular goods may be tainted. If, having such a commercial domicile in a country which by the outbreak of war becomes an enemy country, he desires to avoid the consequences entailed by such domicile, he may avail himself of the interval allowed by law to discontinue or dissociate himself from the business in question. Inasmuch, however, as goods at sea when the war commenced may be captured before such reasonable interval has elapsed, the Court will in a proper case take notice of a discontinuance or dissociation taking place after the capture, or will even adjourn proceedings in the Prize Court to give an opportunity for such discontinuance or dissociation. In the case of goods shipped after the commencement of the war, the circumstances of the shipment must be considered. The shipment may have been made by or with the privity of the claimant in the ordinary course of the business in the enemy country. In such a case the claimant will have elected to continue the business, and there will be a case for condemnation. Only if the shipment was made without the privity of the claimant or as a step in discontinuing or dissociating himself from the enemy connection can there be any question of their release. Such a case will be determined in the same way as like questions with regard to goods at sea when the war commenced. There is, in their Lordships' opinion, no principle upon which any such exception as that set up in the present case can be based. It is the duty of the Court to hold an even hand between belligerents and neutrals, and not to create in favour of the latter, and at the expense of the former, exceptions or exemptions not clearly justified by the principles of international law. Their Lordships are of opinion that the respondent's interest in the goods in question ought to have been condemned for the reasons above stated. It therefore becomes unnecessary to deal with the second argument put forward on behalf of the Crown, namely, that which was based on the alleged attempt of the respondent to deceive the Court.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs, and the respondent's interest in the goods in question condemned accordingly.

NOTE.—The nations are sharply divided as to the test that should be applied for the determination of enemy character. In France and the Continental countries generally, nationality is the sole test. Political

allegiance practically determines enemy character. Calvo. IV, sec. 1932; Bonfils (Fauchille), sec. 1343. But Great Britain, followed by America and Japan, adopted from Grotius the principle that whatever persons or property are so situated as to be under enemy control and thus to increase the strength of the enemy possess enemy character. At the London Naval Conference of 1908-1909 an attempt was made to reconcile these divergent views, but without success. Japan, Holland and Spain supported the Anglo-American practice, but Austria-Hungary, Germany, Italy and Russia supported France. Hence the question was left open. This difference in point of view is largely explained by the fact that in the wars waged by Great Britain the preponderance of her navy has made the destruction of enemy commerce one of the chief objects of British strategy and has given to prize law a greater importance than it has in any other country. The Anglo-American principle is denominated trade domicile or commercial domicile, but in its application it is not confined to persons engaged in commerce. It differs from civil or personal domicile in that it is not regarded as permanent nor for all purposes, that it is more easily acquired and abandoned and is restricted to the relation of the persons or property concerned to the war. For further discussions of the Anglo-American-Japanese doctrine of enemy character based upon commercial domicile see *The Vigilantia* (1798), 1 C. Robinson, 1; *The Diana* (1803), 5 Ib. 60; *The Antonia Johanna* (1816), 1 Wheaton, 159; *The Pizarro* (1817), 2 Ib. 227; *The Freundschaft* (1819), 4 Ib. 105; *The Johanna Emille* (1854), Spinks, 317; *The Baltica* (1857), 11 Moore, P. C. 141; *The Cheshire* (1866), 3 Wallace, 231; *Mitchell v. United States* (1874), 21 Ib. 350; *The Rostock* (Egypt, 1915), 1 Br. & Col. P. C. 523; *The Eumaeus* (1915), 1 Ib. 605; *The Lützow* (No. 4) (Egypt, 1916), 2 Ib. 122; *Cargo ex Mukden* (1904), 2 Hurst & Bray, 25. One engaged in trade may have one or more commercial domiciles distinct from his personal or civil domicile, *The Matchless* (1822), 1 Hagg. Adm. 97; *O'Mealey v. Wilson* (1808), 1 Camp. 482; *The Jonge Klassima* (1804), 5 C. Robinson, 297; *The Aina* (1854), Spinks, 8; *The Gerasimo* (1857), 11 Moore, P. C. 88. "A man may have different national characters," said Lord Stowell, "according to the course of different transactions," *The Two Brothers* (1799), 1 C. Robinson, 131, 132. A trade domicile acquired in a neutral country by a citizen of one of the belligerents after the outbreak of hostilities will not be recognized by either belligerent, *The Dos Hermanos* (1817), 2 Wheaton, 76. A commercial domicile cannot be acquired without residence. Hence the claim of a firm composed of Germans resident in Antwerp and arguing that their place of business in Buenos Ayres gave to their goods shipped from that point a neutral character was rejected, *The Hypatia* (1916), L. R. [1917] P. 36. A subject of one of the belligerents domiciled in the territory of the other is held to have an enemy character, *The Venus* (1814), 8 Cranch, 253; and so also of a neutral domiciled in enemy territory, *The Herman* (1802), 4 C. Robinson, 228. His personal disposition toward the belligerents is immaterial, *Mrs. Alexander's Cotton* (1865), 2 Wallace, 404. A British subject interned by the enemy but allowed sufficient

freedom to protect the business of his employer, a British Company, was held to be an alien enemy because of his voluntary residence in enemy territory, *Scotland v. South African Territories, Ltd.* (1917), 33 T. L. R. 255, but enemy character does not attach to one who is only temporarily in enemy territory, *Roberts v. Hardy* (1815), 3 M. & S. 533. A neutral residing in the enemy's country as consul and engaging in trade there acquires enemy character, *The Baltica* (1857), 11 Moore, P. C. 141.

If an alien enemy has acquired a commercial domicile, his subsequent internment does not affect his property rights, *The Annaberg* (Egypt, 1916), 2 Br. & Col. P. C. 241. A resident of enemy territory desiring to show that he does not have enemy character must assume the burden of proof, *The Bernon* (1799), 1 C. Robinson, 102. On the other hand subjects of a belligerent state who are domiciled in a neutral country are treated as neutrals and may trade with the enemy, *The Emanuel* (1799), 1 C. Robinson, 296; *The Danous* (1802), 4 Ib. 255n; *The Ann* (1813), 1 Dodson, 221; *In re Mary, Duchess of Sutherland* (1915), 31 T. L. R. 248; even though the trade in which they are engaged is one which is open only to subjects of the belligerent state, *Livingston v. Maryland Insurance Co.* (1813), 7 Cranch, 506; while an enemy subject carrying on business in a neutral country is treated as a friend, *The Postillon* (1779), Hay & Marriott, 245; *The San José Indiano* (1814), 2 Gallison, 268.

While residence in a neutral country will not protect a merchant's share in a house of trade established in the enemy's country, *The William Bagaley* (1867), 5 Wallace, 377, residence in an enemy's country will condemn his share in a house established in a neutral country, *The Antonia Johanna* (1816), 1 Wheaton, 159. Hence in *The Clan Grant* (1915), 1 Br. & Col. P. C. 272, it was held that two-thirds of the goods in a British ship belonging to a partnership established in Khartoum, two of the three partners being domiciled in Hamburg, could be confiscated as enemy property. And so also of the property of members of a Japanese limited partnership, *The Derfflinger* (No. 4.) (Egypt, 1916), 2 Br. & Col. P. C. 102. Even if owned by a loyal citizen of the country of the captor property coming from enemy territory is enemy property, *The Frances* (1814), 8 Cranch, 335; *The Gray Jacket* (1867), 5 Wallace, 342. But if a subject of a belligerent state have a house of trade in an enemy country and another in a neutral country, the enemy character of the first does not affect the other, *The Portland* (1800), 3 C. Robinson, 41; and if a house of trade established in a neutral country has branches in other neutral countries and in a belligerent country, the business of the latter branch, if kept distinct, will not impart an enemy character to the other business of the firm, *The Lützow* (1917), L. R. [1918] A. C. 435; but if the partners in a neutral firm reside and trade in neutral territory and are also partners in an enemy firm trading in enemy territory they are alien enemies, *Gebruder van Uden v. Burrell* (Scotland), 1916, 1 S. L. T. 117.

It would seem that if the place where a merchant's trade domicile is established ceases to be hostile before his goods are captured, he

should lose his enemy character and his goods be restored to him. But a ship owned by residents of the Cape of Good Hope (a Dutch colony) which was captured after the colony had been conquered by the English was condemned, *The Danckebaar Africaan* (1798), 1 C. Robinson, 107, and goods whose enemy character was due only to the fact that their owner had a trade domicile at the German port of Tsingtau and which were captured ten days after the port was taken by the Japanese were also condemned, *The Danube* (1915), 3 Lloyd's Prize Cases, 152.

Domicile in a country which is based altogether upon residence or commercial interests therein may be terminated by removal, *The Diana* (1804), 5 C. Robinson, 60; *The Ocean* (1804), 5 Ib. 90; *The Venus* (1814), 8 Cranch, 253 (especially Marshall's dissenting opinion); *Gates v. Goodloe* (1880), 101 U. S. 612; *The Juriady* (1904), Takahashi, 591; but compare *Tingley v. Müller* (1917), L. R. [1917] 2 Ch. 144, in which it was held that a German long domiciled in England did not lose his English domicile by merely returning to Germany with intent to reside there. The dissenting opinion of Lord Justice Scrutton seems more correct. If such removal is for the purpose of escaping an enemy character, it must take place soon after the outbreak of war. A delay of eleven months is too long, *The St Lawrence* (1815), 9 Cranch, 120. The fact that the telegraph and the cable enable one at the present time to inform himself at once as to the outbreak of war and to communicate his decision quickly makes prompt action more necessary than formerly, *The Lützow* (No. 4) (Egypt, 1916), 2 Br. & Col. P. C. 122. Domicile of origin easily reverts, especially in war time, and is more easily proven than is the assumption or the continuance of a neutral domicile by an enemy subject, *La Virginie* (1804), 5 C. Robinson, 98; *The Ann Green* (1812), 1 Gallison, 274; *The Flamenco*, *The Orduna* (1915), 1 Br. & Col. P. C. 509. One who takes early steps to withdraw from enemy territory is entitled to the restitution of his property even though his withdrawal may have been prevented by forcible detention, *The Dree Gebroeders* (1802), 4 C. Robinson, 232; *The Ocean* (1804), 5 Ib. 90; *The Juffrow Catherina* (1804), 5 Ib. 141; *The Gerasimo* (1857), 11 Moore, P. C. 88.

In the case of those oriental countries in which extraterritorial jurisdiction is permitted, the question of trade domicile involves some special considerations. In *The Eumaeus* (1915), 1 Br. & Col. P. C. 605, a firm composed of two British and two German partners doing business at Shanghai and registered at the German Consulate in Shanghai as a German firm sought the release of its goods, which had been seized as prize, on the ground that it was domiciled at Shanghai, a neutral port. In holding that none of the partners had acquired or could acquire a neutral domicile at Shanghai and that the firm, by registration at the German Consulate had placed itself under German law, Sir Samuel Evans said:

The celebrated case of *The Indian Chief* [1800] (3 C. Rob. 12; 1 Eng. P. C. 251) was referred to as the great authority upon the doctrine of the immiscible character of merchants of

Western countries residing and carrying on trade in Oriental lands. For the spirit of the doctrine, discussed with such felicity, dignity, and wealth of language, that classical judgment will always be referred to. But it must be remembered that the case dealt with what was known as the "factory" system, which has long since passed away. The "factory" (to use the words of Sir Francis Piggott, ex-Chief Justice of Hong-Kong) "was an establishment tolerated by the State in which it was set up, which, apparently for the convenience of all parties, was withdrawn, as well as all persons therein residing, from the operation of local laws."

The law applicable to this archaic and obsolete system is that which was laid down by Lord Stowell in *The Indian Chief* (3 C. Rob. 12; 1 Eng. P. C. 251), and it is sufficiently stated in this passage from his judgment:

"It is to be remembered that wherever even a mere factory is founded in the Eastern parts of the world, European persons trading under the shelter and protection of those establishments are conceived to take their national character from that association under which they live and carry on this commerce. It is a rule of the law of nations applying particularly to those countries. . . . In China, and I may say generally throughout the East, persons admitted into a factory are not known in their own peculiar national character; and, being not admitted to assume the character of the country, they are considered only in the character of that association or factory."

Since the days of *The Indian Chief* (3 C. Rob. 12; 1 Eng. P. C. 251) a vast change has come over the conditions of commerce between Western and Eastern States. Lord Stowell quoted the line *Doris amara suam non intermiscuit undam*. But the sea, never changing, and yet ever changing within the limits set to the water, has ceased to be a separating influence between distant lands in times of peace, especially since the advent and with the development of steam transit. It has rather become a means of union than of separation in the world of commerce. And Eastern nations have long grown out of the state of necessity for the factory system. Commerce has been fostered, and the great States of the East have been willing to grant to subjects and citizens of the European nations exterritorial privileges of an extensive kind under treaties and otherwise, which relieve those to whom they are granted from obedience to the laws of the Oriental States in which they reside and carry on business, and permit them to be governed, especially in relation to their commerce, when the foreign community is composed by the laws of their own States.

Under treaty China has accorded the rights and privileges of exterritoriality to the chief European States. In Shanghai there is a British Supreme Court. In other parts of China there are the usual Consular Courts. It is not necessary to give any details of the privileges. The British communities

are now regulated by the China and Corea Order in Council of 1904. Similar regulations exist for other European countries, including Germany; and it may be stated shortly that the effect of these is that not only are the respective European communities governed by their own national laws among themselves, but that the Chinese authorities are precluded from exercising any authority in any disputes between the subjects or citizens of the European States respectively, and other foreigners.

Every British subject is required to register himself annually in the prescribed Consulate—see China and Corea Order in Council, 1904, s. 162. The subjects of other States have to do likewise. As one writer has said: "The register is essential in order that the protecting duties of the Minister may be properly exercised; it would be essential even if there were only the national and the British communities; it is ten times more important when the foreign community is composed of many nationalities. If the sheep upon the mountains are not marked, how shall the shepherds know their sheep?"

The decision in *The Eumæus* was made before the decision in *Casdagli v. Casdagli* (1918), L. R. [1919] A. C. 145. If the question of trade domicile in a country where extraterritorial jurisdiction is permitted were presented again, it is possible that the Prize Court would follow the House of Lords. It may be suggested that whatever control was exercised by German law over a German firm in Shanghai was exercised because such law had been adopted by China and was therefore Chinese law, *Imperial Japanese Government v. P. & O. Co.* [1895] A. C. 644. There seems to be no inherent reason why an enemy firm and its enemy members should not acquire a trade domicile in a country where extraterritorial jurisdiction is permitted.

On the subject of enemy character see Baty, "Trade Domicile in War", *Journal of the Society of Comparative Legislation*, N. S. IX, Part I, 157, X, 183; Westlake, "Trade Domicile in War," *Ib.* IX, Part II, 265; Dicey, *Conflict of Laws*, 736; Borchard, sec. 102, 245; Cobbett, *Cases and Opinions*, II, 19; Hyde, II, 557; Moore, *Digest*, VII, 424.

SECTION 2. ARTIFICIAL PERSONS.

DAIMLER COMPANY, Limited, Appellants, v. CONTINENTAL TYRE AND RUBBER COMPANY (GREAT BRITAIN), Limited, Respondents.

HOUSE OF LORDS OF GREAT BRITAIN. 1916.
Law Reports [1916] 2 A. C. 307.

Appeal from a decision of the Court of Appeal, [1915] 1 K. B. 893, affirming an order of Scrutton J. in chambers. . . .

On October 23, 1914, an action was commenced in the name of the respondent company by specially indorsed writ for 5605*l*. 16*s*. alleged to be due from the appellants for principal, interest and notarial charges on three bills of exchange drawn by the respondents and accepted by the appellants in payment for goods supplied to them by the respondents prior to the outbreak of the war with Germany. The writ was issued by the solicitors of the respondent company upon the instructions of the secretary. On October 30, 1914, a summons was taken out in behalf of the respondent company under Order XIV. for leave to sign judgment for the amount of the claim with interest and costs. This summons was opposed by the appellants on the ground that the company and its officers were alien enemies and that consequently the company was incapable of instituting these proceedings or of giving a good and valid discharge for the amount claimed; and, further, that the appellants in paying that amount, would be acting in contravention of the Trading with the Enemy Act, 1914. The appellants therefore contended that the proceedings were wrongly instituted and that unconditional leave to defend should be given to them.

The respondent company was incorporated [in England] under the Companies Acts on March 29, 1905, with a capital of 10,000*l*., subsequently increased to 25,000*l*., in fully paid 1*l*. shares, and had its registered office in London. It was formed for the purpose of selling in the United Kingdom motor car tyres made in Germany by a company incorporated in that country under German law. At the date of the writ the German company held 23,398 shares in the respondent company, and the remaining shares, except one, were held by subjects of the German Empire. The one share was registered in the name of

Mr. Wolter, the secretary of the company, who was born in Germany, but resided in this country and in 1910 became a naturalized subject of the Crown. All the directors were subjects of the German Empire, and three of the four directors were resident in Germany when war was declared; the fourth, who had previously resided in England, left this country for Germany on the outbreak of the war.

The Master made an order that the respondent company be at liberty to sign final judgment in the action. This order was affirmed by Scrutton J. in chambers, and the order of the learned judge was affirmed by the Court of Appeal (Lord Reading C. J., Lord Cozens-Hardy M. R., Kennedy L. J., Phillimore L. J., and Pickford L. J.; Buckley L. J., dissenting). . . .

The Lord Chief Justice [Lord Reading] held, first, that the company was a separate legal entity and did not change its character of an English company because on the outbreak of war all its shareholders and directors resided in an alien enemy country and became alien enemies; and, secondly, that the company's solicitors had authority [from the secretary] to institute these proceedings on behalf of the company. . . .

EARL OF HALSBURY. My Lords, I am of opinion that this judgment should be reversed.

In my opinion the whole discussion is solved by a very simple proposition that in our law, when the object to be obtained is unlawful, the indirectness of the means by which it is to be obtained will not get rid of the unlawfulness, and in this cause the object of the means adopted is to enable thousands of pounds to be paid to the King's enemies. Before war existed between us and Germany, an associated body of Germans availed themselves of our English law to carry on a business for manufacturing motor machines in Germany and selling them here in England and elsewhere, as they were entitled to do, but in doing so they were bound to observe the directions which the Act of Parliament under which they were incorporated required.

They were entitled to receive in the shape of dividends the profits of the concern in proportion to their shares in it. They were all Germans originally, though one afterwards became a naturalized Englishman. Now the right and proper course to follow in the matter—and I have no reason to suppose that any other course was followed—was to distribute to them rateably, according to their shares, the profits of their adventure. But this machine—while perfectly lawful in peace time, becomes

absolutely unlawful when the German traders are at war with this country. I confess it seems to me that the question becomes very plain, when one applies the language of the law to the condition of things when war is declared, between the German who is in the character of shareholder and in control of the company. They can neither meet here, nor can they authorize any agent to meet on any company business. They can neither trade with us nor can any British subject trade with them. Nor can they comply with the provisions for the government of the company which they were bound by their incorporated character to observe.

Under these circumstances it becomes material to consider what is this thing which is described as a "corporation." It is, in fact, a partnership in all that constitutes a partnership except the names, and in some respects the position of those who I shall call the managing partners. No one can doubt that the names and the incorporation were but the machinery by which the purpose (giving money to the enemy) would be accomplished. The absence of the authority to issue the writ is only a part of the larger question. No one has authority to issue a writ on behalf of an alien enemy, because he has no right himself to sue in the Courts of a King with whom his own Sovereign is at war. No person or any body of persons to whom attaches the disability of suing under such circumstances can have authority, and to attempt to shield the fact of giving the enemy the money due to them by the machinery invented for a lawful purpose would be equivalent to enclosing the gold and attempting to excuse it by alleging that the bag containing it was of English manufacture. I observe the Lord Chief Justice says that the company is a live thing. If it were, it would be capable of loyalty and disloyalty. But it is not; and the argument of its being incapable of being loyal is founded on its not being "a live thing." Neither is the bag in my illustration "a live thing." And the mere machinery to do an illegal act will not purge its illegality—*fraus circuitu non purgatur*. After all, this is a question of ingenious words, useful for the purpose for which they were designed, but wholly incapable of being strained to an illegal purpose. The limited liability was a very useful introduction into our system, and there was no reason why foreigners should not, while dealing honestly with us, partake of the benefits of that institution, but it seems to me too monstrous to suppose that for an unlawful, because, after a declaration of war,

a hostile, purpose the forms of that institution should be used, and enemies of the State, while actually at war with us, be allowed to continue trading and actually to sue for their profits in trade in an English Court of justice. . . .

I would like to add that I by no means desire to minimize the value of the weighty judgments to be delivered by your Lordships, but I have thought it important that all may understand the principle that the unlawfulness of trading with the enemy could not be excused by the ingenuity of the means adopted.

VISCOUNT MERSEY. My Lords, I had prepared a judgment expressing my opinion that this appeal ought to be allowed, but since then I have had the opportunity of reading the judgment prepared by my noble and learned friend Lord Parker, and in that judgment my reasons are so fully expressed that I have thought it better to withdraw the judgment I had written.

I am desired to say that Lord Kinnear also had prepared his judgment, but that he will withdraw his judgment in favour of the judgment of my noble and learned friend Lord Parker.

LORD PARKER OF WADDINGTON. My Lords, the judgment I am about to read has been prepared with the assistance and collaboration of Lord Sumner, who authorizes me to state that he agrees with it.

My Lords, in my opinion this appeal ought to be allowed.

When the action was instituted all the directors of the plaintiff company were Germans resident in Germany. In other words, they were the King's enemies, and as such incapable of exercising any of the powers vested in them as directors of a company incorporated in the United Kingdom. They were incapable, therefore, of authorizing the institution of this action. The contention that the secretary of the company could authorize such institution is untenable. The resolution by which he was appointed secretary would confer on him such powers only as were incident to the performance of his secretarial duties. It is true that the directors of the company might by a proper resolution in that behalf have conferred on him a power to authorize the institution of proceedings in the company's name, but they did not do so. . . .

My Lords, under these circumstances, it is, strictly speaking, unnecessary to consider whether a company incorporated in the United Kingdom can under any and what circumstances be an enemy or assume an enemy character. The question has, however, been so elaborately argued both here and in the Court of

Appeal, and is of such general importance, that it would not be right to ignore it.

The principle upon which the judgment under appeal proceeds is that trading with an incorporated company cannot be trading with an enemy where the company is registered in England under the Companies Acts and carries on its business here. Such a company it calls an "English company," and obviously likens to a natural-born Englishman, and accordingly holds that payment to it of a debt which is due to it, and of money which is its own, cannot be trading with the enemy, be its corporators who they may. The view is that an English company's enemy officers vacate their office on becoming enemies and so affect it no longer, and that its enemy shareholders, being neither its agents nor its principals, never in law affect it at all.

My Lords, much of the reasoning by which this principle is supported is quite indisputable. No one can question that a corporation is a legal person distinct from its corporators; that the relation of a shareholder to a company, which is limited by shares, is not in itself the relation of principal and agent or the reverse; that the assets of the company belong to it and the acts of its servants and agents are its acts, while its shareholders, as such, have no property in the assets and no personal responsibility for those acts. The law on the subject is clearly laid down in a passage in Lord Halsbury's judgment in *Salomon v. Salomon & Co.*, [1897] A. C. 22, 30. "I am simply here," he says, "dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence—quite apart from the motives or conduct of individual corporators. . . . Short of such proof"—i. e., proof in appropriate proceedings that the company had no real legal existence—"it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the formation of the company are absolutely irrelevant in discussing what those rights and liabilities are." I do not think, however, that it is a necessary corollary of this reasoning to say that the character of its corporators must be irrelevant to the character of the company; and this is crucial, for the rule against trading with the enemy depends upon enemy character.

A natural person, though an English-born subject of His

Majesty, may bear an enemy character and be under liability and disability as such by adhering to His Majesty's enemies. If he gives them active aid, he is a traitor; but he may fall far short of that and still be invested with enemy character. If he has what is known in prize law as a commercial domicile among the King's enemies, his merchandise is good prize at sea, just as if it belonged to a subject of the enemy Power. Not only actively, but passively, he may bring himself under the same disability. Voluntary residence among the enemy, however passive or pacific he may be, identifies an English subject with His Majesty's foes. I do not think it necessary to cite authority for these well-known propositions, nor do I doubt that, if they had seemed material to the Court of Appeal, they would have been accepted.

How are such rules to be applied to an artificial person, incorporated by forms of law? As far as active adherence to the enemy goes, there can be no difference, except such as arises from the fact that a company's acts are those of its servants and agents acting within the scope of their authority. An illustration of the application of such rules to a company (as it happens a company of neutral incorporation, which is an *a fortiori* case) is to be found in *Netherlands South African Ry. Co. v. Fisher*, 18 Times L. R. 116.

In the case of an artificial person what is the analogue to voluntary residence among the King's enemies? Its impersonality can hardly put it in a better position than a natural person and lead to its being unaffected by anything equivalent to residence. It is only by a figure of speech that a company can be said to have a nationality or residence at all. If the place of its incorporation under municipal law fixes its residence, then its residence cannot be changed, which is almost a contradiction in terms, and in the case of a company residence must correspond to the birthplace and country of natural allegiance in the case of a living person, and not to residence or commercial domicile. Nevertheless, enemy character depends on these last. It would seem, therefore, logically to follow that, in transferring the application of the rule against trading with the enemy from natural to artificial persons, something more than the mere place or country of registration or incorporation must be looked at.

My Lords, I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance. The

acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitely with enemy character. It seems to me that similarly the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company. If not definite and conclusive, it must at least be *prima facie* relevant, as raising a presumption that those who are purporting to act in the name of the company are, in fact, under the control of those whom it is their interest to satisfy. Certainly I have found no authority to the contrary. Such a view reconciles the positions of natural and artificial persons in this regard, and the opposite view leads to the paradoxical result that the King's enemies, who chance during war to constitute the entire body of corporators in a company registered in England, thereby pass out of the range of legal vision, and, instead, the corporation, which in itself is incapable of loyalty, or enmity, or residence, or of anything but bare existence in contemplation of law and registration under some system of law, takes their place for almost the most important of all purposes, that of being classed among the King's friends or among his foes in time of war.

What is involved in the decision of the Court of Appeal is that, for all purposes to which the character and not merely the rights and powers of an artificial person are material, the personalities of the natural persons, who are its corporators, are to be ignored. An impassable line is drawn between the one person and the others. When the law is concerned with the artificial person, it is to know nothing of the natural persons who constitute and control it. In questions of property and capacity, of acts done and rights acquired or liabilities assumed thereby, this may be always true. Certainly it is so for the most part. But the character in which property is held, and the character in which the capacity to act is enjoyed and acts are done, are not *in pari materia*. The latter character is a quality of the company itself, and conditions its capacities and its acts. It is not a mere part of its energies or acquisitions, and if that character must be derivable not from the circumstances of its incorporation, which arises once for all, but from qualities of enmity and amity, which are dependent on the chances of peace or war and are attributable only to human beings, I know not from

what human beings that character should be derived, in cases where the active conduct of the company's officers has not already decided the matter, if resort is not to be had to the predominant character of its shareholders and corporators.

So far as I can find, this precise question has been asked heretofore once and once only, namely, in argument in the case of *Bank of United States v. Deveaux*, (1809) 5 Cranch, 61, 81. The judgment of Marshall C. J. did not answer it, though he decided the case in favour of the party whose counsel suggested this point as part of a wider argument. Accordingly all that can be said is that the suggestion cannot have shocked that great jurist, and his actual decision proceeds upon the assumption that for certain purposes a Court must look behind the artificial *persona*—the corporation—and take account of and be guided by the personalities of the natural persons, the corporators.

In the Court of Appeal the Lord Chief Justice expressed the opinion that the judgment of Marshall C. J. had not been approved in later cases before the Supreme Court of the United States. . . . Long after his time the matter was at last set at rest in the case of the *St. Louis Railway*, 161 U. S. 545, when the Court surveyed all the different phases of the controversy. What is remarkable is the way in which this was done. The Federal Courts did not ignore the existence of the corporators and fix their attention on the place where the corporation was chartered, or the State under whose laws it was registered. They continued to fix their attention on the citizen corporators, but they conclusively and incontestably presumed that they were all citizens of the State of the incorporation. Such bearing, therefore, as these cases have on the present question is in favour of the appellants, for it is plain that great judges, trained in the principles of the English common law, have not found it contrary to principle to look, at least for some purposes, behind the corporation and consider the quality of its members. A somewhat similar observation arises upon *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484. The question fought throughout in that case was whether it was against public policy for English underwriters to indemnify a company, registered in the Transvaal, against losses inflicted upon it just before the outbreak of war by the Government of the South African Republic in order to strengthen its resources in the impending conflict with this country. The case was tried before

the conclusion of peace, but on the common footing that it should be taken that the war was over. The mere suspension of an enemy's right of suit during war never was relied on at all, and the plea that payment on the policy would be an act of trading with the enemy was dropped. The only case made was that payment would relieve enemies of the Crown from losses which the public policy of this country, applicable to war and warlike conditions, required that they should bear themselves. It was the underwriters who insisted on the enemy character of the company, for the company itself denied it. As I read the judgments of the noble Lords, none purported to decide that the company must be an enemy corporation for all purposes by reason of its registration in the Transvaal. They held that even if that assumption were made in the underwriters' favour, yet their appeal must fail. The Lord Chancellor expressly stated that the question might be debateable, as it is now actually being debated, and other noble Lords concurred. Lord Lindley, whose observations alone are expressed at length, could not, I think, have meant to intimate thereby that, in such a case as the present, he would decide for the respondents. What really is significant in that case is this: few, if any, of the shareholders in the company were in fact subjects of the South African Republic. The vast majority were subjects of various European States. The company's argument was, "How can it be contrary to British public policy that individual Frenchmen and Germans or Italians should get the practical benefit of this policy?" In the Court of Appeal, [1901] 2 K. B. 419, Sir A. L. Smith M. R. expressly accepted this argument. To him at least there was no impenetrable screen, interposed by registration, between the company and its shareholders. Beyond this I think for present purposes the case does not go. Further, the cases of the English Roman Catholic colleges in France, cited to your Lordships from 2 Knapp, pp. 23 and 51, do not seem to me to be in point. They turn on the meaning to be attributed to the expression "British subjects" in a particular treaty. If anything, the reliance placed on the fact of the French Government's control over the colleges and on the existing state of English legislation towards Roman Catholic ecclesiastics would militate against the respondents' argument. As an illustration of the view which has been taken (under the Income Tax Acts it is true) of the control which one trading company exercises over another company through the ownership of a controlling interest in the latter's

shares, I would refer to *St. Louis Breweries v. Apthorpe* (1898), 79 L. T. 551, and *Apthorpe v. Peter Schoenhofen Brewing Co.* (1899), 80 L. T. 395. In the latter case, in deciding that an English company, which held a controlling interest in the shares of a United States company, carried on business for income tax purposes in the United States by virtue of that holding and of its control over the business of the latter company, Collins L. J. expressly said that he was not deterred from so deciding by the decision of your Lordships' House in the case of *Salomon v. Salomon & Co.*, [1897] A. C. 22, which was so much relied on in the Court below. I think this analogy not without importance.

My Lords, the truth is that considerations which govern civil liability and rights of property in time of peace differ radically from those which govern enemy character in time of war. Joint-stock enterprise and English legislation and decisions about it have developed mainly since this country was last engaged in a great European war and have taken little, if any, account of warlike conditions. The ideal of joint-stock enterprise, that with limited liability the more unlimited the trading the better, is an ideal of profound peace. The rule against trading with the enemy is a belligerent's weapon of self-protection. I think that it has to be applied to modern circumstances as we find them, and not limited to the applications of long ago, with as little desire to cut it down on the one hand as to extend it on the other beyond what those circumstances require. Though it has been said by high authority (see *M'Connell v. Hector*, 3 Bos. & P. 113, and *Esposito v. Bowden*, 7 E. & B. 763, 779,) to aim at curtailing the commercial resources of the enemy, it has, according to other and older authorities, the wider object of preventing unregulated intercourse with the enemy altogether. Through the Royal licence, which validates such intercourse and such trade, they are brought under necessary control. Without such control they are forbidden. To my mind the rule would be deprived of its substantial justification, and be reduced to a barren canon, if it were held, in circumstances such as these, that it had no application by reason of the mere fact that the company is registered in London.

My Lords, having regard to the foregoing considerations, I think the law on the subject may be summarized in the following propositions:—

- (1.) A company incorporated in the United Kingdom is a

legal entity, a creation of law with the status and capacity which the law confers. It is not a natural person with mind or conscience. To use the language of Buckley L. J., "it can be neither loyal nor disloyal. It can be neither friend nor enemy."

(2.) Such a company can only act through agents properly authorized, and so long as it is carrying on business in this country through agents so authorized and residing in this or a friendly country it is *prima facie* to be regarded as a friend, and all His Majesty's lieges may deal with it as such.

(3.) Such a company may, however, assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading with the enemy.

(4.) The character of individual shareholders cannot of itself affect the character of the company. This is admittedly so in times of peace, during which every shareholder is at liberty to exercise and enjoy such rights as are by law incident to his status as shareholder. It would be anomalous if it were not so also in a time of war, during which all such rights and privileges are in abeyance. The enemy character of individual shareholders and their conduct may, however, be very material on the question whether the company's agents, or the persons in *de facto* control of its affairs, are in fact adhering to, taking instructions from, or acting under the control of enemies. This materiality will vary with the number of shareholders who are enemies and the value of their holdings. The fact, if it be the fact, that after eliminating the enemy shareholders the number of shareholders remaining is insufficient for the purpose of holding meetings of the company or appointing directors or other officers may well raise a presumption in this respect. For example, in the present case, even if the secretary had been fully authorized to manage the affairs of the company and to institute legal proceedings on its behalf, the fact that he held one share only out of 25,000 shares, and was the only shareholder who was not an enemy, might well throw on the company the onus of proving that he was not acting under the control of, taking his instructions from, or adhering to the King's enemies in such manner as to impose an enemy character on the company itself. It is an *a fortiori* case when the secretary is without authority

and necessarily depends for the validity of all he does on the subsequent ratification of enemy shareholders. The circumstances of the present case were, therefore, such as to require close investigation and preclude the propriety of giving leave to sign judgment under Order xiv., r. 1.

(5.) In a similar way a company registered in the United Kingdom, but carrying on business in a neutral country through agents properly authorized and resident here or in the neutral country, is *prima facie* to be regarded as a friend, but may, through its agents or persons in *de facto* control of its affairs, assume an enemy character.

(6.) A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy.

My Lords, the foregoing propositions are not only consistent with the authorities cited in argument, and in particular with what was said in this House in *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484, but they have, I think, the advantage of affording convenient and intelligible guidance to the public on questions of trading with the enemy. It would be a misfortune if the law were such that during war every one proposing to deal with a British company had to examine the character of its shareholders and decide whether the number of the enemy shareholders coupled with the value of their holdings were such as to impose an enemy character on the company itself. It would be still more unfortunate if this question were a question for the jury in each particular case. No one could maintain that a company had assumed an enemy character merely because it had a few enemy shareholders. It might possibly be contended that it assumed an enemy character when its enemy shareholders amounted to (say) one-half, three-fifths, or five-eighths of the whole, but how if the one-half, three-fifths, or five-eighths held only one-sixth, one-fifth, or one-fourth of the shares? The Legislature might, but no Court could possibly, lay down a hard and fast rule, and, if no such rule were laid down, how could any one proposing to deal with the company ascertain whether he was or was not proposing to deal with the enemy?

My Lords, I desire to add this. It was suggested in argument that acts otherwise lawful might be rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war was over. I entirely dissent from this view. I see no reason why a company should not trade merely because

enemy shareholders may after the war become entitled to their proper share of the profits of such trading. I see no reason why the trustee of an English business with enemy *cestuis que trust* should not during the war continue to carry on the business, although after the war the profits may go to persons who are now enemies, or why moneys belonging to an enemy but in the hands of a trustee in this country should not be paid into Court and invested in Government stock or other securities for the benefit of the persons entitled after the war. The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant. In early days the King's prerogative probably extended to seizing enemy property on land as well as on sea. As to property on land, this prerogative has long fallen into disuse. Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war. In the meantime it would be lamentable if the trade of this country were fettered, businesses shut down, or money allowed to remain idle in order to prevent any possible benefit accruing thereby to enemies after peace. The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes. . . .

Order of the Court of Appeal reversed and action dismissed, and all orders made therein discharged.

[All the judges agreed that the secretary of the respondent company had no authority to act in the present case. Lord Sumner, Lord Mersey and Lord Kinnear concurred in the judgment of Lord Parker of Waddington. Lord Atkinson, Lord Parmoor and Lord Shaw of Dunfermline agreed with the opinion expressed by Lord Reading in the Court of Appeals that a company registered and conducting business in England was not affected with enemy character merely by the fact that its directors and shareholders were enemies.]

THE HAMBORN.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1919.
Law Reports [1919] A. C. 993.

Appeal from a decree of the Admiralty Division (in Prize),
[1918] P. 19.

The appellants were a company incorporated according to the laws of the Netherlands and were the owners of the steamship Hamborn. They appealed from a judgment of the President (Sir Samuel Evans) condemning that ship as prize on the ground that she was enemy property. . . . [All the shares in the appellant company were owned by two other companies incorporated in the Netherlands, and all the shares in these two Dutch companies were owned by German companies, all the directors in which were Germans resident in Germany and all the shares in which were owned in Germany. Two Germans resident in Rotterdam were in charge of the business of the German companies, one of which had the management of the appellant company.]

LORD SUMNER. . . . Sufficient details are given of the ship's regular trade to make it quite clear what she was bought for. Her trade was, with unimportant exceptions, to load ore at Spanish ore ports for Rotterdam, going out with coal from South Wales to French ports to save a ballast voyage. When the war broke out, she was sent across the Atlantic and was trading on time charter there when she was captured. . . . Their Lordships entertain no doubt that the Hamborn was bought and employed as a useful tender to the German iron industry on the Ruhr, that her other trading was ancillary, and that her Dutch flag, Dutch ownership and local management at Rotterdam were adopted merely for the convenience of her German import trade. For some purposes no doubt she belonged to and was counted as part of the mercantile marine of the kingdom of the Netherlands, but in substance she and her trade were a support to and a part of the commerce and the shipping of the German Empire. The legal effect of all this, particularly on her liability to capture, is another matter.

The true question is one, in the President's phrase, of determining the neutral or enemy character of the Hamborn. Unless

either her Dutch flag or the country of incorporation of the owning company or the place of residence of her subordinate managers or some or all of these matters be conclusive, she bore a character which justified her condemnation, for she formed part of that enemy commerce which a belligerent is entitled to disable and restrain.

It may be as well to put on one side certain aspects of the effect of using a national flag, which are not now relevant and are really only false analogies. If a ship for her own purposes has assumed and used a national flag to which she is not really entitled, she may in some circumstances be held bound by the nationality which she has thus assumed without warrant. If a ship lawfully flies a national flag, she may in some cases be said, by a figure of speech, to derive from her flag the system of municipal law, by which her contracts or her civil liabilities are governed. In the first case she cannot deny as against captors the national character, which she has irregularly taken; in the second, she derives from the national character, which is actually hers and is indicated by her flag, the system of legal rights and liabilities applicable to her. Neither case touches the position, where in a question with captors it becomes necessary to consider whether the ship, though in contemplation of technical municipal law a neutral ship, of neutral registry, and entitled to the benefits of a neutral flag, is, in the view of the law of nations, a ship of enemy character and liable to be treated in accordance with that character. If the case turned on her user *de facto* at the time of capture it would be simple: so it would be, if her owners were natural persons of neutral nationality *de jure*, neither adhering to the enemy nor allowing their chattel to be used in enemy service. The present case is more complex. The criteria for deciding enemy character in the case of an artificial person differ from those applicable to a natural person, since in the nature of things conduct, which is one of the most important matters, can in the former case only be the conduct of those who act for or in the name of the artificial person. It was decided in the case of *Daimler Company v. Continental Tyre and Rubber Company*, [1916] 2 A. C. 307, that, in the case of an incorporated company, the right and power of control may form a true criterion, the control, that is, of those persons who are the active directors of the company and whose orders its officers must obey, or the control of those persons who in their turn are the masters of the directorate and

make or unmake it by the use of the controlling majority of votes. The application of this test presents no difficulty here, for no living person and no sentient mind exercised or possessed any control over the Hamborn Steamship Company, except persons and minds of enemy nationality. The residence of the two German managers in Rotterdam, if not altogether immaterial, at any rate cannot affect the result, since the question is not one of trading with enemy subjects, resident or carrying on business in a neutral country, but is one of the character of an artificial *persona*, whose trade is carried on for it under the supreme direction and control of enemies born. Their Lordships agree with a passage of the President's judgment, which sufficiently represents the true gist of his reasoning, [1918] P. 25:—"The centre and whole effective control of the business of the Hamborn Steamship Company was in Germany. Having regard to these facts, the vessel must be regarded in this Court as belonging to German subjects," in a claim by captors for condemnation.

...
Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

NOTE.—It is a general rule of law that a corporation is a citizen of that jurisdiction under the laws of which it was formed, and the citizenship or nationality of its officers or shareholders is immaterial. In the exercise of its war rights a belligerent will observe the corporate fiction when it is to its interest to do so. In *The Pedro* (1899), 175 U. S. 354, a vessel which belonged to a corporation formed in Spain and which had a Spanish registry and license and was manned by Spanish officers and crew was held to be a Spanish ship although all the shareholders in the corporation were British. Early in the Great War, the courts began to disregard the corporate fiction and to make the character of the corporation depend upon the character of the real parties in interest or the persons by whom it was controlled. In *The Tommi and The Rothersand* (1914), L. R. [1914], P. 251, the court intimated that if a British ship were owned by a British company, all the shareholders being alien enemies, the court would determine the character of the ship by the character of the individuals who composed the corporation. A mining company which owned mines in Germany was incorporated in France for the purpose of selling the products of its German mines to persons in Africa. One of its four directors was a German, and eight-tenths of its stock was held by Germans. In *Mines of Barbary v. Raymond* (1916), 44 *Clunet*, 226, the Court of Paris held that the corporation was under German control and could not sue in a French court, but in *The Poona* (1915), 1 Br. & Col. P. C. 275, in which the character of a similar corporation owning the cargo was involved, the Prize Court clung to the corporate fiction. A vessel flying the British flag but under such control of an

enemy corporation that the British ownership was merely nominal was treated as an enemy vessel, *The St. Tudno* (1916), L. R. [1916] P. 291. See also *In re Hilckes* (1916), L. R. [1917] 1 K. B. 48; *Clapham Steamship Co. v. Naamlooze &c Vulcaan* (1917), L. R. [1917] 2 K. B. 639; Young, "The Nationality of a Juristic Person," *Harvard Law Review*, XXII, 1; Piclotto, "Alien Enemy Persons, Firms and Corporations in English Law," *Yale Law Journal*, XXVII, 167; Schuster, "The Nationality and Domicile of Trading Corporations," *Grotius Society, Proceedings*, II, 57; notes and comments in *Yale Law Journal*, XXVII, 108, and *Harvard Law Review*, XXVIII, 629 and XXX, 83; Hyde, II, 567.

SECTION 3. PROPERTY.

THIRTY HOGSHEADS OF SUGAR, BENTZON, CLAIMANT, v. BOYLE AND OTHERS.

SUPREME COURT OF THE UNITED STATES. 1815.
9 Cranch, 191.

Appeal from the sentence of the Circuit Court for the district of Maryland, condemning 30 hogsheads of sugar, the property of the Claimant, a Danish subject, it being the produce of his plantation in Santa Cruz, and shipped after the capture of that island by the British, to a house in London for account and risk of the Claimant, who was a Danish officer and the second in authority in the government of the island before its capture; and who, shortly after the capture, withdrew, and has since resided in the United States and in Denmark. By the articles of capitulation, the inhabitants were permitted to retain their property, but could only ship the produce of the island to Great Britain. This sugar was captured in July, 1812, after the declaration of war by the United States against Great Britain, and libelled as British property. . . .

MARSHALL, Ch. J., delivered the opinion of the Court. . . .

Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the do-

main of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

Must the produce of a plantation in that island, shipped by the proprietor himself, who is a Dane residing in Denmark, be considered as British, and therefore enemy property?

In arguing this question, the counsel for the Claimant has made two points.

1. That this case does not come within the rule applicable to shipments from an enemy country, even as laid down in the British Courts of admiralty.

2. That the rule has not been rightly laid down in those Courts, and consequently will not be adopted in this.

1. Does the rule laid down in the British Courts of admiralty embrace this case?

It appears to the Court that the case of the *Phoenix* [5 C. Rob. 20] is precisely in point. In that case a vessel was captured on a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the produce of their estates in Surinam.

The counsel for the captors considered the law of the case as entirely settled. The counsel for the Claimant did not controvert this position. They admitted it; but endeavoured to extricate their case from the general principle by giving it the protection of the treaty of Amiens. In pronouncing his opinion, sir William Scott lays down the general rule thus: "Certainly nothing can be more decided and fixed, as the principle of this Court and of the Supreme Court, upon very solemn arguments, than that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the superior Court, that it is no longer open to discussion. No question can be made on the point of law, at this day."

Afterwards, in the case of the *Vrow Anna Catharina*, [5 C. Rob., 161] sir William Scott lays down the rule, and states its reason. "It cannot be doubted," he says, "that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own

plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation."

This rule laid down with so much precision, does not, it is contended, embrace Mr. Bentzon's claim, because he has not "incorporated himself with the permanent interests of the nation." He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British.

This distinction does not appear to the Court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general character. The acquisition of land in Santa Cruz binds him, so far as respects that land, to the fate of Santa Cruz, whatever its destiny may be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British.

The general commercial or political character of Mr. Bentzon could not, according to this rule, affect this particular transaction. Although incorporated, so far as respects his general character, with the permanent interests of Denmark, he was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was, at that time, British; and though as a Dane, he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz, he was no enemy: he could ship his produce to Great Britain in perfect safety.

The case is certainly within the rule as laid down in the British Courts. The next inquiry is: how far will that rule be adopted in this country?

The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part

conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

Without taking a comparative view of the justice or fairness of the rules established in the British Courts, and of those established in the Courts of other nations, there are circumstances not to be excluded from consideration, which give to those rules a claim to our attention that we cannot entirely disregard. The United States having, at one time, formed a component part of the British empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it.

It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British Courts, will be considered as forming a rule for the American Courts, or that any recent rule of the British Courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

The rule laid down in the *Phoenix* is said to be a recent rule, because a case solemnly decided before the lords commissioners in 1783, is quoted in the margin as its authority. But that case is not suggested to have been determined contrary to former practice or former opinions. Nor do we perceive any reason for supposing it to be contrary to the rule of other nations in a similar case.

The opinion that the ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, is an opinion which certainly prevails very extensively. It is not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the ocean,

may depend on the domicil of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offense to the course of human opinion to say that the proprietor, so far as respects his interest in this land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities. In condemning the sugars of Mr. Bentzon as enemy property, this Court is of opinion that there was no error, and the sentence is affirmed with costs.

THE PRIZE CASES.

THE BRIG AMY WARWICK. THE SCHOONER CRENSHAW. THE BARQUE HIAWATHA. THE SCHOONER BRILLIANTE.

SUPREME COURT OF THE UNITED STATES. 1863.
2 Black. 635.

[The facts and first part of the opinion are printed *ante*, 378.]

MR. JUSTICE GRIER. . . . II. We come now to the consideration of the second question. What is included in the term "enemies' property"?

Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as "enemies' property" whether the owner be in arms against the Government or not?

The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy, by capturing his property on the high seas.

The appellants contend that the term "enemy" is properly

applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the common law, which say, "that persons who wage war against the King may be of two kinds, subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies."

They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party and its "*de facto* government" to submit to their laws and assist in their scheme of revolution; that the acts of the usurping government cannot legally sever the bond of their allegiance; they have, therefore, a co-relative right to claim the protection of the government for their persons and property, and to be treated as loyal citizens, till legally convicted of having renounced their allegiance and made war against the Government by treasonably resisting its laws.

They contend, also, that insurrection is the act of individuals and not of a government or sovereignty; that the individuals engaged are subjects of law. That confiscation of their property can be effected only under a municipal law. That by the law of the land such confiscation cannot take place without the conviction of the owner of some offense, and finally that the secession ordinances are nullities and ineffectual to release any citizen from his allegiance to the national Government, and consequently that the Constitution and laws of the United States are still operative over persons in all the States for punishment as well as protection.

This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battlefield or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is "unconstitutional!!!" Now, it is a proposition

never doubted, that the belligerent party who claims to be sovereign may exercise both belligerent and sovereign rights, (see 4 Cr., 272). Treating the other party as a belligerent and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity. We have shown that a civil war such as that now waged between the Northern and Southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean.

Under the very peculiar Constitution of this Government, although the citizens owe supreme allegiance to the Federal Government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws.

Hence, in organizing this rebellion, they have acted as States claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign state. Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the General Government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force—south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power.

All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors.

But in defining the meaning of the term "enemies' property," we will be led into error if we refer to Fleta and Lord Coke for their definition of the word "enemy." It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law.

Whether property be liable to capture as "enemies' property" does not in any manner depend on the personal allegiance of the owner. "It is the illegal traffic that stamps it as 'enemies'

property.' It is of no consequence whether it belongs to an ally or a citizen. 8 Cr., 384. The owner, *pro hac vice*, is an enemy.' 3 Wash. C. C. R., 183.

The produce of the soil of the hostile country, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicile of the owner, and much more so if he reside and trade within their territory. . . .

[MR. JUSTICE NELSON delivered a dissenting opinion, in which CHIEF JUSTICE TANEY and JUSTICES CATRON and CLIFFORD concurred.]

NOTE.—Property may acquire an enemy character even though the neutral owner thereof resides in the state to which he owes allegiance. Property in enemy territory and which is necessarily associated therewith is enemy property regardless of ownership, *The Phoenix* (1803), 5 C. Robinson, 20; *The Jonge Klassima* (1804), 5 Ib. 297; *The Nina* (1854), Spinks, 276; *The Friendschaft* (1819), 4 Wheaton, 105; *United States v. Farragut* (1875), 22 Wallace, 406; *Young v. United States* (1877), 97 U. S. 39; *Briggs v. United States* (1890), 25 Ct. Cl. 126. It is employed in enemy commerce upon the same footing and with the same advantages as the property of the enemy's resident subjects. It thereby strengthens his resources and hence an enemy character is attributed to it, *The San Jose Indiano* (1814), 2 Gallison 268, 286, and it is subject to the same treatment as other enemy property, *Juragua Iron Co. v. United States* (1909), 212 U. S. 297, unless the owner thereof takes prompt measures upon the outbreak of hostilities to withdraw his property, *The Gray Jacket* (1867), 5 Wallace, 342. Enemy territory is any territory which the enemy controls and can use for purposes of war, without regard to the title by which he holds it, *The Gutenfels* (1916), L. R. [1916] 2 A. C. 112. If goods manufactured in an enemy country and ordered and paid for by a neutral purchaser are shipped to him by sea, they will be treated as enemy goods until actual delivery, *The United States* (1916), L. R. [1917] P. 30. The fact that the produce of enemy land was shipped before the outbreak of war does not exempt it from capture, *The Vrow Anna Catherina* (1804), 5 C. Robinson, 161. The protection extended to foreigners in Turkey does not permit the condemnation of their goods as the produce of enemy soil, *The Asturian* (1916), L. R. [1916] P. 150. A corporation formed in Belgium which removed its office to England soon after the outbreak of the Great War did not become an enemy company in consequence of the German occupation of Belgium, *Société Anonyme Belge des Mines d'Aljustrel (Portugal) v. Anglo-Belgian Agency, Lt.* (1915), L. R. [1915] 2 Ch. 409; but compare *Central India Mining Co., Ltd. v. Société Coloniale Anversoise* (1919), L. R. [1920] 1 K. B. 753.

It has been customary to hold that the national character of a ship

is determined by the flag which its official documents show it to be entitled to fly, *The Marie Glaesser* (1914), L. R. [1914] P. 218; *The Manchuria* (1905), 2 Hurst and Bray, 52. This was a definite test, easy of application. It was founded however upon the assumption that no country would issue documents to a vessel not owned, at least in part, by its own citizens. But there are several countries such as Argentine, Chile, Colombia, Paraguay and possibly others, which document vessels owned entirely by foreigners. In the Great War it was found that some German merchant ships were documented under Argentine law and flew the Argentine flag. Hence a vessel's documents are not a conclusive indication of its national character. In *The Proton* (Egypt, 1916), 2 Br. & Col. P. C. 107, affirmed (1918), L. R. [1918] A. C. 578, the court went behind the ship's documents and determined its real ownership and national character. In order to ascertain whether a vessel is or is not enemy property, the court will consider all the circumstances of its registration, management and employment. See *The Tommi and The Rothersand* (1914), L. R. [1914] P. 251; *The Polzeath* (1916), L. R. [1916] P. 241; *The St. Tudno* (1916), L. R. [1916] P. 261; *The Solveig* (1915); *Journal Of-fice*, Nov. 12, 1915; Mount, "Prize Cases in the English Courts Arising Out of the Present War," *Columbia Law Review*, XV, 316; Bor-chard, sec. 207; Hyde, II, 548, 562; Moore, *Digest*, VII, 406.

CHAPTER XIII.

THE RULE OF NON-INTERCOURSE WITH ENEMIES.

SECTION 1. TRADE WITH THE ENEMY.

THE HOOP.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1799.

1 C. Robinson, 196.

This is a case of a claim of several British merchants for goods purchased on their account in Holland, and shipped on board a neutral vessel. . . . Mr. Malcom of Glasgow, and several other merchants of North Britain, had, long prior to hostilities, been used to trade extensively with Holland; . . . after the irruption of the French into Holland, they had constantly applied for, and obtained special orders of his majesty in council permitting them to continue that trade; [but] after the passing of the acts of parliament 35 G. 3. c. 15. § 80., 36 G. 3. c. 76., 37 G. 3. c. 12 . . . it was apprehended in that part of Great Britain, that by these acts the importation of such goods was made legal: but for the greater security, they still made application to the commissioners of customs at Glasgow, to know what they considered to be the interpretation of the said acts, and whether his majesty's license was still necessary; and . . . were informed, under the opinion of the law advisers of the said commissioners, that no such orders of council were necessary, and that all goods brought from the United Provinces would in future be entered without them; and that in consequence of such information, they had caused the goods in question to be shipped at Rotterdam for their account; ostensibly documented for Bergen to avoid the enemy's cruisers. . . .

SIR W. SCOTT [LORD STOWELL] . . . It is said that these circumstances compose a case entitled to great indulgence; and I do not deny it. But if there is a rule of law on the subject

binding the Court, I must follow where that rule leads me; though it leads to consequences which I may privately regret, when I look to the particular intentions of the parties.

In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as an universal principle of law.—*Ex naturâ belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indicationes bellorum satis declarant, &c.* He proceeds to observe, that the interests of trade, and the necessity of obtaining certain commodities have sometimes so far overpowered this rule, that different species of traffic have been permitted, *prout e re sua, subditorumque suorum esse censent principes* (Bynk. Q. J. P. B. 1, c. 3). But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war *quoad hoc*. It is, as he expresses it, *pro parte sic bellum, pro parte pax inter subditos utriusque principis*. It appears from these passages to have been the law of Holland; Valin, l. iii., tit. 6, art. 3, states it to have been the law of France, whether the trade was attempted to be carried on in national or in neutral vessels; it will appear in a case which I shall have occasion to mention (The Fortuna), to have been the law of Spain; and it may, I think, without rashness be affirmed to have been a general principle of law in most of the countries of Europe.

By the law and constitution of this country, the sovereign alone has the power of declaring war and peace—He alone therefore who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcilable with the general interest of the state. It is for the state alone, on more enlarged views of policy, and of all circumstances which may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opin-

ion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in a time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and controul of the government, charged with the care of the public safety?

Another principle of law, of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication as fundamentally inconsistent with the relation at that time existing between the two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians *a persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour.—The same principle is received in our courts of the law of nations; they are so far British courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the king's peace *pro hac vice*. But otherwise he is totally *ex lex*; even in the case of ransoms which were contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom. A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? to such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection

and against its authority. Bynkershoek expresses himself with great force upon this argument in his first book, chapter 7, where he lays down that the legality of commerce and the mutual use of courts of justice are inseparable: he says, that cases of commerce are undistinguishable from cases of any other species in this respect—*Si hosti semel permittas actiones exercere, difficile est distinguere ex quâ causâ oriantur, nec potui animadvertere illam distinctionem unquam usu fuisse servatam.*

Upon these and similar grounds it has been the established rule of law of this Court, confirmed by the judgment of the supreme court, that a trading with the enemy, except under a royal license, subjects the property to confiscation:—and the most eminent persons of the law sitting in the supreme courts have uniformly sustained such judgments. . . . [A considerable number of English decisions are here reviewed.]

I omit many other cases of the last and the present war merely on this ground that the rule is so firmly established, that no one case exists which has been permitted to contravene it.—For I take upon me to aver, that all cases of this kind which have come before that tribunal have received an uniform determination. The cases which I have produced prove that the rule has been rigidly enforced:—where acts of parliament have on different occasions been made to relax the navigation-law and other revenue acts; where the government has authorized, under the sanction of an act of parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced, where strong claim not merely of convenience, but almost of necessity, excused it on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been enforced not only against the subjects of the crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied states in war had a right to notice and apply, mutually, to each other's subjects. Indeed it is the less necessary to produce these cases, because it is expressly laid down by Lord Mansfield, as I understand him, that such is the maritime law of England. (*Gist v. Mason*, 1 T. R., 85.) . . .

A reference has been made to the statutes.—It is not argued that the statutes will, in a just apprehension of them, authorize such a trade, but that they might have led to an innocent mistake on the subject. . . . I may feel greatly for the individuals who, I have reason to presume, acted ignorantly under advice that they thought safe: but the Court has no power to depart from the law which has been laid down, and I am under the necessity of rejecting the claims.

KERSHAW v. KELSEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1869.
100 Massachusetts, 561.

[The defendant, a citizen of Massachusetts, being in Mississippi, took in February, 1864, a lease of the plaintiff's plantation, and agreed to pay a rent of \$10,000, half in cash and half out of the cotton crop to be grown thereon. Shortly after, he was driven out by Confederate soldiers and returned to Boston. The plaintiff then took possession of the plantation, harvested the crops, and delivered them to the defendant's son by whom they were forwarded to the defendant in Boston and sold. The plaintiff sues for the rent still due on the lease. The defendant contends that such a lease constituted trading between enemies contrary to the principles of international law and in contravention of the terms of the act of Congress of 1861, c. 3, § 5, and the President's proclamation thereunder. The trial judge ruled that the contract was legal.]

GRAY, J. . . . This case presents a very interesting question, requiring for its decision a consideration of fundamental principles of international law. It is universally admitted that the law of nations prohibits all commercial intercourse between belligerents, without a license from the sovereign. Some *dicta* of eminent judges and learned commentators would extend this prohibition to all contracts whatever. In a matter of such grave importance, the safest way of arriving at a right result will be to examine with care the principal adjudications upon the subject. . . . [Here follows an elaborate examination of the authorities.]

The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or by orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmissions, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.

The trading or transmission of property or money which is prohibited by international law is from or to one of the countries at war. An alien enemy residing in this country may contract and sue like a citizen. 2 Kent. Com., 63. When a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the amount of the debt, throughout the war, payment then to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so, the offence would be imputable to him, and not to the person paying him the money. *Conn v. Penn.*, Pet. C. C. 496. *Denniston v. Imbrie*, 3 Wash. C. C. 396. *Ward v. Smith*, 7 Wallace, 447. *Buchanan v. Curry*, 19 Johns. 137. The same reasons cover an agreement made in the enemy's territory to pay money there out of funds accruing there and not agreed to be transmitted from within our own territory; for, as was said by the Supreme Court of New York in the case last cited,

“the rule is founded in public policy, which forbids, during war, that money or other resources shall be transferred so as to aid or strengthen our enemies. The crime consists in exporting the money or property, or placing it in the power of the enemy.”

The lease now in question was made within the rebel territory where both parties were at the time, and would seem to have contemplated the continued residence of the lessee upon the demised premises throughout the term; the rent was in part paid on the spot, and the residue, now sued for, was to be paid out of the produce of the land; and the corn, the value of which is sought to be recovered in this action, was delivered and used thereon. No agreement appears to have been made as part of or contemporaneously with the lease, that the cotton crop should be transported, or the rent sent back, across the line between the belligerents; and no contract or communication appears to have been made across that line, relating to the lease, the delivery of possession of the premises or of the corn, or the payment of the rent of the one or the value of the other. The subsequent forwarding of the cotton by the defendant's son from Mississippi to Massachusetts may have been unlawful; but that cannot affect the validity of the agreements contained in the lease. Neither of these agreements involved or contemplated the transmission of money or property, or other communication, between the enemy's territory and our own. We are therefore unanimously of opinion that they did not contravene the law of nations or the public acts of the government, even if the plantation was within the enemy's lines; and that the plaintiff, upon the case reported, is entitled to recover the unpaid rent, and the value of the corn. . . .

JANSON v. DRIEFONTEIN CONSOLIDATED MINES,
LIMITED.

HOUSE OF LORDS OF GREAT BRITAIN. 1902.
Law Reports [1902] A. C., 484.

The respondents, a company registered under the law of the South African Republic, in August, 1899, insured, with the appellants and other underwriters, gold against (*inter alia*) “arrests, restraints, and detainments of all kings, princes, and peo-

ple," during its transit from the Gold Mines near Johannesburg in the Transvaal to the United Kingdom. On October 2, 1899, the gold was during its transit seized on the frontier by order of the Government of the South African Republic. On October 11 at 5 P. M. a state of war began between the British Government and the Government of the Republic. At the time of the seizure war was admitted to be imminent. The respondent company had a London office, but its head office was at Johannesburg. Most of its shareholders were resident outside of the Republic and were not subjects thereof. The respondent company having brought an action against the appellant upon the policy, it was agreed between the parties that the action should be treated as if brought at the conclusion of the war. . . . The action was tried without a jury before Mathew J., who held that the appellant was liable, [1900] 2 Q. B. 339. This decision was affirmed by the Court of Appeal (A. L. SMITH M. R. and ROMER L. J., VAUGHAN WILLIAMS L. J., dissenting), [1901] 2 K. B. 419.

EARL OF HALSBURY L. C. My Lords, in this case the plaintiffs, who had effected a policy at Lloyd's on a large quantity of gold which was being consigned from South Africa to London, sue on this policy, dated August 1, 1899, in respect of a seizure by the Transvaal Government of the gold in question on October 2 of the same year. There is no doubt that the loss of the gold is covered by the express words of the policy in question, and the defence to the action rests upon the proposition that the policy was an unlawful contract.

It might be the subject of debate whether I am correct in assuming what I assume for the purpose of my judgment, but for the sake of clearness I do assume that the plaintiff company was an alien, a subject of the Transvaal Government. I also assume, though this also might be the subject of debate, that both parties to the contract had in their minds, on August 1, the possibility and even the probability of war. The making of the policy and the loss under it both accrued before the breaking out of war, which it is agreed between the parties occurred at 5 o'clock on October 11.

All the judges, with the exception of Vaughan Williams L. J., have held that the plaintiffs are entitled to recover upon the policy; and if I rightly understood the reasoning of the learned Lord Justice, he thinks the policy was in its inception illegal, and would have been equally illegal even if no war had inter-

vened. He does indeed say that there could have been no claim if war had not occurred; but he is mistaken, since the assumed imminence of the war and the seizure by the Transvaal Government might have occurred even if war had finally been averted.

The difficulty I have in dealing with the learned judge's judgment is that I do not trace any definite proposition as to what interest of the State, or what public injury, is supposed by him to be involved; but at all events, in whatever sense the learned judge uses this phrase, it is upon this general ground alone that he decides against the plaintiffs.

Now, as I have said, I understand the judgment of Vaughan Williams L. J., is put upon the sole ground that this policy is against public policy. He puts it at various parts of his judgment in different ways. He calls it a contravention of public interest, injurious to the country, inconsistent with public duty, repugnant to the interests of the State, and no doubt there are equivalent phrases to be found in many judgments where their application is expounded; but the learned judge, beyond using these phrases, does not go on to explain in what sense they are used, and how and on what principles of law the policy in question was unlawful. . . . In treating of various branches of the law learned persons have analyzed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any Court can invent a new head of public policy.

. . . .
If this is the true view, it is not difficult to solve the question whether a contract of insurance made before a war and sought to be enforced in respect of a loss incurred before the war is illegal, either in its inception or at the date when the loss was incurred. However stated it amounts to this—that the thing done must be in its nature an assistance to the public enemy, and if there be no public enemy there can be no aid given to him. Nor is this a mere question of words: the importance of the whole region of public policy involved makes the actual existence of war at the time of the creation of the contract or its fulfilment necessary. I will assume for my present purpose (though I think it might well be debated) that the Transvaal Company did, to quote the language of Vaughan Williams L. J., “enter into this contract with a view to the imminent war which might or might not break out with Great Britain.”

I note that the Lord Justice uses the phrase “imminent,” and

one is disposed to ask, Does that word represent a principle capable of logical application to the propositions ultimately arrived at? It is notorious that for many years the Transvaal Government had been purchasing and storing up arms and ammunition to an enormous extent which could have no other object than a war with this country. Were all the contracts made with British subjects illegal? or with foreigners, breaches of neutrality on the part of countries of which such subjects were supplying arms and ammunition to the expected enemy of the British Government? No such principle has ever been affirmed by any lawyer yet, and the principles upon which commercial intercourse must cease between nations at war with each other can only be where the heads of the State have created the state of war. . . .

In order to produce the effect, either nationally or municipally, it must be a war between the two nations. No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended: an alien enemy cannot sue in the Courts of either country while the war lasts; but the rights on the contract are unaffected, and when the war is over the remedy in the Courts of either is restored.

The earlier writers on international law used to contend that some public declaration of war was essential, and Valin, writing in 1770, does not hesitate to describe Admiral Boscawen's operations in the Mediterranean in 1754 as acts of piracy, because no actual declaration of war had been made; but though it cannot be said that that view is now the existing international understanding, it is essential that the hostility must be the act of the nation which makes the war, and no amount of "strained relations" can affect the subjects of either country in their commercial or other transactions: "*Quand le conducteur de l'état, le Souverain, déclare la guerre à un autre Souverain on entend que la nation entière déclare la guerre à une autre nation. Car le Souverain représente la nation, et agit au nom de la société entière, et les nations n'ont à faire, les unes aux autres, qu'un corps dans leur qualité de nations. Ces deux nations sont donc ennemis; et tous les sujets le l'une sont ennemis de tous les sujets de l'autre. L'usage est ici conforme aux principes*" (Vattel, *Droit des Gens*, liv. 3, c. 5, § 70).

In *Muller v. Thompson*, (1811) 2 Camp. 610, 12 R. R. 753, Lord Ellenborough held that the voyage to Königsberg in 1810,

though the relations were very strained between this country and Prussia, British ships being actually excluded from Prussia, and it being objected that this was an enemy's port, was lawful inasmuch as no war was declared and no act of hostility committed—we could not be said to be at war, which alone could render the voyage unlawful.

Trading with the King's enemies is, of course, illegal. Undertaking by contract to indemnify the King's enemies against loss inflicted by the King's forces is also illegal. Such things are manifestly unlawful; but the words "King's enemies" are a necessary feature of the last proposition.

Substituting the word "aliens," who may possibly or even probably become the King's enemies—and in this case the loss and the policy were both before there were any persons who could answer to that description—it would be, to my mind, to introduce a new principle into our law to hold that the probability of a war should have the same operation as war itself. It is war and war alone that makes trading illegal.

I think no more striking example of the mischief which might result from so loose a mode of applying the principle of public policy in Courts of justice could be found than the example which elicited Serjeant Marshall's protest, which I have quoted above. Lord Mansfield had expressed the opinion that it was good policy to permit an insurance by British underwriters of enemies' goods, because we might obtain more in premiums than we should lose by capture; but this, in my view, was plainly wrong, and Valin, followed by Pothier and Emergon, denounced such insurance, and said that by the English practice one part of the nation was restoring them by insurance what another part took from them by arms.

If it were competent to a Court of law to consider the question which Vaughan Williams L. J. propounds upon principles of public policy, apart from the known and ascertained rule that intercourse between nations at war is forbidden (which, for the reasons I have given, I think it is not), I should answer the question in a different way from that at which he arrives. Instead of a known and ascertained rule which makes it clear whether a contract is unlawful or not, each of the contending parties to a contract must look all round the political horizon, and form a judgment whether in some one or more contingencies the fulfilment of it may be injurious to his own country in the event of war; and I note here again the word "imminent" finds

a place in the learned judge's question. It seems to me that the hindrance done to the free commercial intercourse between nations would be far more injurious to the interests of both than the injury the learned judge suggests. . . .

For these reasons I move your Lordships that this appeal be dismissed and the judgment of the Court of Appeal affirmed with costs.

LORD DAVEY. . . . My Lords, there are three rules which are established in our common law. The first is that the King's subjects cannot trade with an alien enemy, i. e., a person owing allegiance to a Government at war with the King, without the King's licence. Every contract made in violation of this principle is void, and goods which are the subject of such a contract are liable to confiscation. The second principle is a corollary from the first, but is also rested on distinct grounds of public policy. It is that no action can be maintained against an insurer of an enemy's goods or ships against capture by the British Government. One of the most effectual instruments of war is the crippling of the enemy's commerce, and to permit such an insurance would be to relieve enemies from the loss they incur by the action of British arms, and would, therefore, be detrimental to the interests of the insurer's own country. The principle equally applies where the insurance is made previously to the commencement of hostilities, and was, therefore, legal in its inception, and whether the person claiming on the policy be a neutral or even a British subject if the insurance be effected on behalf of an alien enemy. The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace. . . .

Order of the Court of Appeal affirmed and appeal dismissed with costs.

[Opinions were also delivered by LORD MACNAGHTEN, LORD BRAMPTON, LORD ROBERTSON, and LORD LINDLEY.]

SELIGMAN v. EAGLE INSURANCE COMPANY.

CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE OF ENGLAND. 1917.
Law Reports [1917] 1 Ch. 519.

NEVILLE J. In this case the defendant company lent a sum of money to a person who is now an alien enemy. The loan was made some time before the war. It was part of the terms of the loan that the borrower had to insure his life with the defendant company in a certain sum on two policies of assurance. The terms of the policies differ in only one respect from the usual terms to be found in ordinary life policies, and that is that there is a covenant in them on the part of the assured, the borrower, to pay the premiums on his life policy from year to year, so that he could not, as is possible in the ordinary case, simply cease to pay his premiums and let the policy drop. If he did so, he was liable to be sued by the insurance company for all the future payments to be made during his life; but I do not think that really affects the question I have to determine. Part of the arrangement for the loan was that two sureties should be found, and they were found. So that the insurance company not only had the security of the policies on the borrower's life, but they also had the liability of two sureties for the amount due. The present plaintiff is one of those sureties. After the war broke out the plaintiff tendered the premiums which fell due on the policies, which were only accepted by the insurance company with a reservation as to whether the contract, at all events between them and the alien enemy, was not at an end. Subsequently the plaintiff tendered the whole of the amount due on the loan and demanded at the same time delivery of the securities which the insurance company held for the debt, asserting in that regard the ordinary rights of a surety when he discharges the debt of his principal. There again the insurance company refused to assign the policies except under a reservation, that is, a reservation of the question of whether the policies were good at all having regard to the outbreak of war and the fact that they were on the life of an alien enemy.

It seems to me that the question lies within an exceedingly small compass. From my point of view there is nothing in the nature of the contract to put an end to it upon the outbreak of war. It seems to me that the insurance company could have sued the assured under his contract for the amount of the pre-

miums under the covenant contained in the policy; but that of course depends upon whether if they had sued and recovered the money it would have involved any act on their part which would come within the definition of "unlawful intercourse with the enemy" to put it in the words of Warrington L. J. in the case of *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, 716: "If an act for its performance necessitates the concurrence of the other party, the promisee, and that involves unlawful intercourse with the alien, the latter would be discharged from his obligation." Bringing an action certainly involves the concurrence of the promisee, and I think no less the receipt of money tendered involves intercourse with the other party, and the question is whether that is lawful or unlawful intercourse. I have no doubt, and the Proclamation itself indicates the fact, that by law the receipt of money from an enemy in itself involves no unlawful intercourse. I take it that if every alien enemy of the British Empire at the present time were to make an offer of all he possessed to various individuals residing within the limits of the British Empire there would be nothing illegal in British subjects accepting it unless there was reason to suspect bribery. It is not the payment and the concurrence involved in accepting the payment that can possibly be unlawful intercourse.

The question here is this: A contract existed at the date of the outbreak of war that if the assured paid his premiums punctually during the whole of his life, then upon his death the company would pay a lump sum to his executors. It may be that by refusing to accept payment of the premium on the part of the policy-holder he would have been unable ever to recover against the company the lump sum contracted for, because it was a conditional contract, the contract being that payment should be punctually made. Now does the result of that intercourse, so to speak, involve anything illegal? The right of the policy-holder is clearly suspended during the war, and were he to die tomorrow his executors could recover nothing from the company; but whenever peace is restored between the countries normal relations in this regard will be resumed, and, although the right of the policy-holder is undoubtedly suspended, if the policy itself is not made void either at the time when war was declared or at the time when the current year of the policy ran out, I can see nothing illegal in the acceptance of the premiums by the company because no benefit can accrue to the enemy alien at all as the result of the payment of his premium; but what will result

is that perhaps some day somebody who is not an enemy alien may have a right to sue the company for the amount assured. It seems to me this is one of those cases where the right is suspended.

I also think it cannot possibly be said here that mere receipt of the premiums by the company is unlawful intercourse with the enemy, and that really is the whole question. The payment itself cannot be illegal. Then, having regard to the result of the payment, can it be illegal? I say "no," because as regards the enemy alien himself he gains nothing by the transaction while he is an enemy alien. I come, therefore, to the conclusion that the company were bound to hand over the securities without reservation to the surety upon payment of the debt, and that the limitations they propose to insert in the assignment are not justified. There will be a declaration that the policies did not become void only by reason of Baron von Liebermann becoming an alien enemy, that the payment and receipt of premiums are not unlawful intercourse with an alien enemy, and that on payment of the amount due under the mortgage the plaintiff will be entitled to an assignment of the policies without reservation in accordance with the terms of the proviso for redemption. . . .

NOTE.—It is held in all Anglo-American jurisdictions that the existence of war operates to interrupt all direct relations between the subjects of the two belligerents on the ground that intercourse is inconsistent with a state of war. This is treated as a rule of international law, but it is impossible to reconcile this with the fact that many countries, e. g., Holland, Germany, Austria-Hungary and Italy, permit commercial relations with enemy subjects to continue until expressly forbidden and with the further fact that both Great Britain and the United States mitigate the hardship of the rule of non-intercourse by issuing licenses to trade, and such licenses are not in conflict with any rule of international law. The rule is really one of domestic policy only. Its source was correctly stated by Lord Shaw of Dunfermline in *Daimler Co. Lt. v. Continental Tyre and Rubber Co. Ltd.*, [1916] 2 A. C. 307, 328:

War is not war between Sovereigns or Governments alone. It puts each subject of the one belligerent into the position of being the legal enemy of each subject of the other belligerent; and all persons bound in allegiance and loyalty to His Majesty are consequently and immediately, by the force of the common law, forbidden to trade with the enemy Power or its subjects.

Several reasons have been assigned for the enforcement of the rule. In general it is based upon the danger to the state of allowing transactions which can so easily be made the medium of treasonable com-

munications. But in *Brandon v. Nesbitt* (1794), 6 T. R. 23, the injury that non-intercourse might inflict upon the enemy was first put forward as the reason for the practice, while in *Esposito v. Bowden* (1857), 7 E. & B. 764, and in *Kershaw v. Kelsey* (1869), 100 Mass. 561, trade with the enemy was condemned because of its tendency to increase the enemy's resources. It may also be suggested as a practical consideration that if unrestricted trade with the enemy were to be permitted, it would require a degree of supervision which would impose an intolerable burden upon the government concerned.

There is a growing opinion in Anglo-American jurisdictions in favor of a relaxation of the rule. So long as a belligerent can forbid its subjects to trade with the enemy when circumstances appear to require such a measure, it would seem that its interests are sufficiently safeguarded, and until affirmative action to the contrary is taken normal relations between individuals should not be interrupted. But the older rule is firmly embodied in judicial decisions, and has been asserted unequivocally by the British Prize Court in the Great War. In *The Panariellos* (1915), 1 Br. & Col. P. C. 195, 198, Sir Samuel Evans said:

When war breaks out between States, all commercial intercourse between citizens of the belligerents *ipso facto* becomes illegal, except in so far as it may be expressly allowed or licensed by the head of the State.

An attempt was made to introduce a more liberal rule at the Second Hague Conference by the adoption of section h of Article XXIII of Regulations respecting the Laws and Customs of War on Land; but the language of the section is ambiguous and the subject received so little discussion that the Conference can hardly have realized what far-reaching changes the new rule involved.

Among the many cases in which the old rule has been applied these may be noted: *Potts v. Bell* (1800), 8 T. R. 548 (goods purchased after the outbreak of war in an enemy country but not necessarily from an enemy subject and imported in a neutral ship); *The Jonge Pieter* (1801), 4 C. Robinson, 79 (trade with the enemy through a neutral port); *The Odin* (1799), 1 C. Robinson, 248 (fraudulent transfer to a neutral of property engaged in enemy trade); *Willison v. Patteson* (1817), 7 Taunton, 439 (the rule applied to all contracts made during war and not merely to those of a commercial nature and even though suit be not brought until the close of the war); *The Mashona* (South Africa, 1900), 17 Buchanan, 135 (cargo in a British vessel consigned by British merchants to neutral merchants domiciled in enemy territory); *The Neptunus* (1807), 6 C. Robinson, 403; *The Panariellos* (1915), 1 Br. & Col. P. C. 195; *The Parchim* (1915) 1 Ib. 579 (the courts of any of a group of allied states may condemn the goods of a subject of any such state who violates the rule of non-intercourse); *The Bernon* (1798), 1 C. Robinson, 101; *The Ocean* (1804), 5 Ib. 90; *The Juffrow Catherina* (1804), 5 Ib. 141; *The Manningtry* (1915), 1 Br. & Col. P. C. 497; *The Lützow* (Egypt, 1916), 2 Ib. 122 (a belligerent or neutral subject engaged in trade in an

enemy country must withdraw seasonably). In *The Rapid* (1814), 8 Cranch, 155, the court held that an American who sent an agent to Canada to bring away his property at the outbreak of war with Great Britain was engaged in intercourse with the enemy and his property was condemned. This is unduly rigorous and the case would probably not now be followed. A subject or a neutral who finds himself or his property in enemy territory at the outbreak of war should be given a reasonable opportunity to withdraw without in the meantime exposing himself to the penalty of trading with the enemy, and it was so held in *Nigel Gold Mining Co. Lt. v. Hoade*, L. R. [1901] 2 K. B. 849. A neutral partner is not obliged to withdraw from transactions with the enemy which were in progress at the outbreak of war provided he does nothing actively to facilitate them. His obligations in this respect are less stringent than those of subjects of a belligerent state, *The Anglo-Mexican* (1916), L. R. [1916] P. 112.

The rule of non-intercourse is directed not only against commercial relations but against intercourse of any kind. In *The Cosmopolite* (1801), 4 C. Robinson, 8, 10, Lord Stowell said:

It is perfectly well known, that by war, all communication between the subjects of the belligerent countries must be suspended, and that no intercourse can legally be carried on between the subjects of the hostile states but by the special license of their respective governments.

In *The Rapid* (1814), 8 Cranch, 155, 162 the Supreme Court of the United States said:

If by trading, in prize law, was meant that signification of the term which consists in negotiation or contract, this case would certainly not come under the penalties of the rule. But the object, policy and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent states. Negotiation or contract has, therefore, no necessary connexion with the offence. Intercourse inconsistent with actual hostility, is the offence against which the operation of the rule is directed.

This principle was applied by the Court of Appeal in *Robson v. Premier Oil and Pipe Line Co. Lt.* (1915), 113 L. T. Rep. 523, in which it was held that enemy shareholders in a British company may not during war vote for directors of the company nor may they delegate their voting rights to a proxy.

For many years the common law courts and the prize courts in Great Britain were in opposition in the views which they held as to whether insurance on enemy property was a permissible transaction. It would seem that contracts of insurance with enemy subjects or for the benefit of enemy subjects are in their nature as objectionable as any other form of contract, but Lord Mansfield, influenced perhaps by his strong bias in favor of the mercantile interests of England, argued that the premiums paid by the enemy and the opportunity which such transactions offered to obtain information from the enemy more

than counterbalanced any advantage to the enemy's trade. Hence for about fifty years an owner whose property had been condemned in a British prize court could go into a British common law court and recover its value from a British insurance company. See *Henkle v. Royal Exchange Assurance Co.* (1749), 1 Vesey, 317; *Gist v. Mason* (1786), 1 T. R. 84. This continued until 1794 when Lord Mansfield's decisions were overruled and the common law courts placed themselves in harmony with the prize courts. *Brandon v. Nesbitt* (1794), 1 T. R. 28; *Bristow v. Towers* (1794) 6 T. R. 35. (The argument of counsel for plaintiff in the latter case, pages 37-44, includes an account of the practice of the British Government and a full review of the cases.) Six years later the question again came up in the leading case of *Potts v. Bell* (1800), 8 T. R. 548, when the decisions made in 1794 were affirmed, and since that time the common law courts have consistently followed the admiralty rule.

While the right of a belligerent state to interdict all intercourse with enemy subjects is clear, it may find it advantageous to permit certain forms of commerce. This is done by means of licenses to trade, *The Hope* (1813), 1 Dodson, 226; *Kensington v. Inglis* (1807), 8 East, 273; *Coppell v. Hall* (1869), 7 Wallace, 542. Such a license, even if granted to an alien enemy, implies authority to insure, *Usparicha v. Noble* (1811), 13 East, 332; and to maintain an action in the courts, *United States v. One Hundred Barrels of Cement* (1862), 27 Fed. Cases, No. 15945. Licenses are construed liberally in order that the intent of the grantor may be made effective, *The Cosmopolite* (1801), 4 C. Robinson, 11; *The Goede Hoop* (1809), Edwards, 327; *Flindt v. Scott* (1814), 5 Taunton, 674, but conditions attached to a license must be strictly complied with, *Camelo v. Britten* (1824), 4 B. & A. 184. A license may be vitiated either by fraud in obtaining it, *The Clio* (1805), 6 C. Robinson, 67, or by misuse of it, *Vandyck v. Whitmore* (1801), 1 East, 475.

During the Great War, trade with the enemy was regulated by detailed measures of legislation. These are fully reviewed and hundreds of cases which have arisen under them are cited in Huberich, *The Law Relating to Trading with the Enemy*. For an analysis of German measures dealing with enemy property, see Thiesing, "Trading with the Enemy," *Sen. Doc. 107, 65th Congress, 1st session*; Huberich, "German Laws Relating to Payments to Alien Enemies," *Columbia Law Review*, XVII, 653.

On the effect of war on intercourse between enemy subjects see Baty, "Intercourse with Alien Enemies," *Law Quarterly Review*, XXXI, 30; Schuster, *Effect of War and Moratorium on Commercial Transactions*; Atherley-Jones, *Commerce in War*; Baty and Morgan, *War: Its Conduct and Legal Results*, 294; Bentwich, *The Law of Private Property in War*; Bordwell, *The Law of War between Belligerents*; Bonfils (Fauchille), sec. 1060; Cobbett, *Cases and Opinions*, II, 62; Page, *War and Alien Enemies*, ch. vi; Garner, I, ch. viii; Borchard, sec. 354; Hyde, II, 202; Moore, *Digest*, VII, 237.

SECTION 2. THE EFFECT OF WAR ON CONTRACTS.

GRISWOLD v. WADDINGTON.

COURT OF ERRORS OF NEW YORK. 1819.
16 Johnson, 498.

Error to the Supreme Court.

[Prior to the War of 1812, Henry Waddington, an American citizen resident in London, and Joshua Waddington, an American citizen resident in New York, were partners in a trading house in London. In the course of the war one of the plaintiffs went to England and entered into commercial relations with Henry Waddington. After the war the plaintiffs brought suit for the balance due on these transactions, and sought to charge Joshua Waddington as a partner of Henry Waddington. The judgment of the trial court in favor of the plaintiffs was reversed by the Supreme Court, and to reverse that decision this writ of error was brought.]

THE CHANCELLOR [JAMES KENT]. . . .

[The first part of the opinion is an exhaustive review of all the authorities on the effect of war on commercial relations between subjects of the belligerent states.]

It appears to me, that the declaration of war did, of itself, work a dissolution of all commercial partnerships existing at the time between British subjects and American citizens. By dealing with either party, no third person could acquire a legal right against the other, because one alien enemy cannot, in that capacity, make a private contract binding upon the other. This conclusion would seem to be an inevitable result from the new relations created by the war. It is a necessary consequence of the other proposition, that it is unlawful to have communication or trade with an enemy. To suppose a commercial partnership (such as this was) to be continued, and recognized by law as subsisting, when the same law had severed the subjects of the two countries, and declared them enemies to each other, is to suppose the law chargeable with inconsistency and absurdity. For what use or purpose could the law uphold such a connection, when all further intercourse, communication, negotiation, or dealing between the partners, was prohibited, as unlawful? Why

preserve the skeleton of the firm, when the sense and spirit of it has fled, and when the execution of any one article of it by either, would be a breach of his allegiance to his country? In short, it must be obvious to every one, that a state of war creates disabilities, imposes restraints, and exacts duties altogether inconsistent with the continuance of that relation. Why does war dissolve a charter-party, or a commercial contract for a particular voyage? Because, says Valin, (tom. 1, p. 626,) the war imposes an insurmountable obstacle to the accomplishment of the contract; and this obstacle arising from a cause beyond the control of the party, it is very natural, he observes, that the charter-party should be dissolved, as of course. Why should the contract of partnership continue by law when equally invincible obstacles are created by law to defeat it? If one alien enemy can go and bind his hostile partner, by contracts in time of war, when the other can have no agency, consultation, or control concerning them, the law would be as unjust as it would be extravagant. The good sense of the thing as applicable to this subject, is the rule prescribed by the Roman law, that a copartnership in any business ceased, when there was an end put to the business itself. *Item si adicujus rei societas sit, et finis negotio impositus est, finitur societas.* (Inst. 3, 26, 6).

The doctrine, that war does not interfere with private contracts, is not to be carried to an extent inconsistent with the rights of war. Suppose that H. & J. W. had entered into a contract before the war, which was to continue until 1814, by which one of them was to ship, half yearly, to London, consigned to the other, a cargo of provisions, and the other, in return, to ship to New York a cargo of goods. The war which broke out in 1812, would surely have put an end to the further operation of this contract, lawful and innocent as it was when made. No person could raise a doubt on this point; and what sanctity or magic is there in a contract of copartnership, that it must not yield to the same power?

If we examine, more particularly, the nature and objects of commercial partnerships, it would seem to be contrary to all the rules by which they are to be construed and governed, that they should continue to exist, after the parties are interdicted by the government, from any communication with each other, and are placed in a state of absolute hostility. It is of the essence of the contract that each party should contribute something valuable, as money, or goods, or skill and labour, on joint account, and

for the common benefit; and that the object of the partnership should be lawful and honest business. . . . But how can the partners have any unity of interest, or any joint object that is lawful, when their pursuits, in consequence of the war, and in consequence of the separate allegiance which each owes to his own government, must be mutually hostile? The commercial business of each country, and of all its people, is an object of attack, and of destruction to the other. One party may be engaged in privateering, or in supplying the fleets and armies of his country with provisions, or with munitions of war; and can the law recognize the other partner as having a joint interest in the profits of such business? It would be impossible for the one partner to be concerned in *any commercial business*, which was not auxiliary to the resources and efforts of his country in a maritime war. And shall the other partner be lawfully drawing a revenue from such employment of capital, and such personal services directed against his own country? We cannot contemplate such a confusion of obligation between the law of partnership and the law of war, or such a conflict between his interest as a partner, and his duty as a patriot, without a mixture of astonishment and dread. Shall it be said that the partnership must be deemed to be abridged during war, to business that is altogether innoxious and harmless? But I would ask, how can we cut down a partnership in that manner without destroying it? The very object of the partnership, in this case, was, no doubt, commercial business between England and the United States, and which the hostile state of the two countries interdicted; or it may have been business in which the personal communication and advice of each partner was deemed essential, and without which the partnership would not have been formed. It is one of the principles of the law of partnership, that it is dissolved by the death of any one of its members, however numerous the association may be; and the reason is this: the personal qualities of each partner enter into the consideration of the contract, and the survivors ought not to be held bound without a new assent, when, perhaps, the character of the deceased partner was the inducement to the connection. . . . Shall we say that the partnership continues during war, in a quiescent state, and that the hostile partners do not share in each other's profits, made in carrying on the hostile commerce of each country? It would be then most unjust to make the party who did not share in profit to share in loss, and to be bound by the

other's contracts; but if one partner does not share in profit, that alone destroys a partnership. It would be what the Roman lawyers called *Societas leonina*, in allusion to the fable of the lion, who, having entered into a partnership with the other animals of the forest in hunting, appropriated to himself all the prey. (Dig. 17, 2, 29, s. 2. Pothier, Trait, du Cont. de Soc. n. 12.)

It is one of the fundamental principles of every commercial partnership, that each partner has the power to buy and sell, and pay and receive, and to contract and bind the firm. But then, again, as a necessary check to this power, each partner can interfere and stop any contract about to be made by any one of the rest. This is an elementary rule, derived from the civil law. *In re pari potiore causam esse prohibentis constat.* . . . But if the partnership continues in war between hostile associates, this salutary power is withdrawn, and each partner is left defenceless. If the law continues the connection, after it has destroyed the check, the law is then cruel and unjust.

In speaking of the dissolution of partnerships, the French and civil law writers say, that partnerships are dissolved by a change of the condition of one of the parties which disables him to perform his part of the duty, as by a loss of liberty, or banishment, or bankruptcy, or a judicial prohibition to execute his business, or by confiscation of his goods. . . . The English law of partnership is derived from the same source; and as the cases arise, the same principles are applied. The principle here is, that when one of the parties becomes disabled to act, or when the business of the association becomes impracticable, the law, as well as common reason, adjudges the partnership to be dissolved.

Another objection was raised, from the want of notice of the dissolution of the partnership. The answer to this is extremely easy, and perfectly conclusive. Notice is requisite when a partnership is dissolved by the act of the parties, but it is not necessary when the dissolution takes place, by the act of the law. The declaration of war, from the time it was duly made known to the nations, put an end to all future dealings between the subjects and citizens of the two countries, and, consequently, to the future operation of the copartnership in question. The declaration of war was, of itself, the most authentic and monitory notice. Any other notice in a case like this, between two public enemies, who had each his domicile in his own country, would

have been useless. All mankind were bound to take notice of the war, and of its consequence. The notice, if given, could only be useless, as his countrymen could not hold any lawful intercourse with the enemy. It could not be given as a joint act, for the partners cannot lawfully commune together.

But, it was said, that the peace had a healing influence, and restored the parties to all their rights, and arrested all confiscations, and forfeitures, which had not previously and duly attached. I do not know that I differ from the counsel in any just application of this doctrine. As far as the war suspended the right of action existing in the adverse party prior to the war, that right revived; but if the contract in this case was unlawful, peace could not revive it, for it never had any legal existence. So too, the copartnership being once dissolved by the war, it was extinguished forever, except as to matters existing prior to the war. . . .

The judgment of the Supreme Court ought to be affirmed.

[Senator Van Vechten delivered a concurring opinion. Senator Livingston and Senator Seymour dissented.]

HUGH STEVENSON & SONS, Limited v. AKTIENGESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE.

COURT OF APPEAL OF ENGLAND. 1916.
Law Reports [1917] 1 K. B. 842.

Appeal from a decision of Atkin J. reported [1916] 1 K. B. 763. . . .

SWINFEN EADY L. J. . . . The defendants appeal from a declaratory judgment of Atkin J. in an action commenced under the statute 5 Geo. 5, c. 36, intituled "An Act to facilitate Legal Proceedings against Enemies in certain cases." The writ is indorsed with a claim for a declaration that the effect of the present war is to terminate a contract of agency and dissolve a partnership between plaintiffs and defendants entered into before the outbreak of war, and also for a declaration that the defendants have only certain rights in respect thereof mentioned in the indorsement. The defendants contend that the declaration made by the judge is erroneous in law and in effect confers rights on the plaintiffs to which they are not entitled.

The plaintiffs are an English limited company, and the defendants are a German company, carrying on business at Dresden.

By an agreement in writing, dated November 22, 1906, and made between the plaintiffs and defendants, and which was a subsisting agreement at the date of the outbreak of war, the plaintiffs became the sole agents of the defendants for Great Britain and the British Colonies for the sale of the defendants' "metal edging and studding" machines at a commission of 15 per cent. on machines sold through their agency. These machines are made in Germany, and are used for affixing metal edges and studs to cardboard boxes.

By the same agreement the parties became partners in the business of manufacturing in England and selling here and in the British Colonies the metal edges and studs. This business was carried on at the "clamp factory," a part of the plaintiffs' own works, for which an agreed amount was payable to the plaintiffs and the business was carried on in the name of the plaintiffs only, and all goods sold were invoiced to customers in the plaintiffs' name only, the name of the German firm not appearing. In some cases the plaintiffs themselves bought the goods so manufactured for use in their own separate business of cardboard box making, and the agreement fixed the price at which they were entitled so to do. In other cases the metal edges and studs were sold to outside customers, and the agreement also fixed the prices for these sales.

Certain machinery and fittings were necessary for the manufacture of these clamps, and such machinery belonged to the partners in equal shares, and for any additional machines required each partner was to contribute half the cost. The agreement further provides that before dividing profits interest at 5 per cent. is to be allowed on each partner's capital.

At the trial the judge declared that the agency constituted by the agreement was terminated and the partnership dissolved on August 4, 1914, by the outbreak of war. The defendants contended on this appeal that such declaration was erroneous, but in my judgment it was clearly right. No partnership can exist between an enemy company resident in Germany and an English company resident here. If two partners are resident in two different countries, and war breaks out between those countries, the partnership is determined and put an end to by the war: *Evans v. Richardson* (1817), 3 Mer. 469; *Griswold v. Wadding-*

ton (1819), 16 Johnson, Sup. Ct. New York, 438; Lindley on Partnership, 8th ed., pp. 87, 88; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 34. Similarly the contract of agency was terminated by the war. It was a trading contract, and war dissolves all contracts which involve trading with the enemy: *Esposito v. Bowden* (1857), 7 E. & B. 763, 784. The language of the declaration as to the rights of the parties consequent on the termination of the agency requires certain verbal amendments, which were agreed to while the appeal was being argued. As amended it will be as follows:—2. That the agency constituted by the said contract was terminated on the 4th day of August, 1914, and that the defendants are entitled to such sum in respect thereof as was due to them from the plaintiffs on that date, and also to such further sum in respect thereof as has since become due, and to the return of all unsold machines (if any).

The defendants' main contention on this appeal is that the judgment is wrong in deciding that upon the dissolution the English partner has a right to purchase the share of the enemy partner at a valuation, and that the enemy partner is not entitled to any profits or interest on capital since August 4, 1914, notwithstanding that by the contract of partnership he is allowed 5 per cent. interest on capital, and although the English partner has since the outbreak of war carried on the business of the partnership and used the partnership capital and machinery, of which a moiety belongs to the enemy partner.

In the absence of a special agreement to the contrary, the general rule is that on the dissolution of a partnership all the property belonging to the partnership shall be converted into money by a sale, even although a sale may not be necessary for the payment of debts: Lindley on Partnership, 8th ed., p. 623.

In the present case there is no contract giving the plaintiffs the right to purchase their late partner's share at a valuation, or to take it themselves upon paying its value, and I fail to see any ground upon which the judgment in this respect can be supported.

I am opinion that the effect of the war is not to confer upon the English partner a right to buy his late partner's share at a valuation which he would not otherwise have had.

Again, by s. 42 of the Partnership Act an outgoing partner is entitled to a share of the profits made after the dissolution, or

to interest where the business of the firm is carried on with its capital or assets, without any final settlement of accounts as between the firm and the outgoing partner. No exception is made by the statute in the case where the dissolution is the result (s. 34) of a partner becoming an enemy. The fact that the enemy partner cannot during the war bring any action to enforce such right does not prevent the existence of the right. Debts owing to enemies are not confiscated on the occurrence of war, although during the war enemies cannot sue for payment.

The plaintiffs in carrying on the business in England after August 4, 1914, were not under the control of the enemy, or communicating or holding any intercourse with him, or receiving anything from him, or sending anything to him, or making any payment to him. They were not trading with him, although some benefit might accrue to the enemy from what they were doing. Every transaction whereby a profit may ultimately enure to an enemy is not necessarily a transaction entered into for the benefit of an enemy. If it were, no English company with a single enemy shareholder could continue to trade. Again, some profits may have arisen from the business after the commencement of the war from contracts entered into or obligations incurred previously. In *Daimler Co. v. Continental Tyre and Rubber Co.*, [1916] 2 A. C. 307, 347, the following passage occurs in the speech of Lord Parker of Waddington, in which Lords Sumner, Mersey, and Kinnear concurred—that is to say, the majority of the House concurred in this view. Lord Parker said: “It was suggested in argument that acts otherwise lawful might be rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war was over. I entirely dissent from this view. I see no reason why a company should not trade merely because enemy shareholders may after the war become entitled to their proper share of the profits of such trading. I see no reason why the trustee of an English business with enemy *cestuis que trust* should not during the war continue to carry on the business, although after the war the profits may go to persons who are now enemies, or why moneys belonging to an enemy but in the hands of a trustee in this country should not be paid into Court and invested in Government stock or other securities for the benefit of the persons entitled after the war. The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant. In early

days the King's prerogative probably extended to seizing enemy property on land as well as on sea. As to property on land, this prerogative has long fallen into disuse. Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war. In the meantime it would be lamentable if the trade of this country were fettered, businesses shut down, or money allowed to remain idle in order to prevent any possible benefit accruing thereby to enemies after peace. The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes." There is, however, considerable difficulty in the way of an outgoing partner seeking to establish that profits have been made since the dissolution which are attributable to the use of his share of capital or assets. It is almost always necessary to direct special inquiries, rendered necessary by the nature of the business and many other circumstances which have to be taken into consideration. In some cases the subsequent profits made may be wholly attributable to the diligence, business aptitude, credit, and personal qualities of the remaining partner. Indeed, Lord Lindley states in the 8th edition of his book, at p. 677, that he is not aware of any instance in which a judgment for a share of profits after dissolution has been worked out and has resulted beneficially to the person in whose favour it was made.

Whatever difficulties there may be in the way of the defendants establishing a right to any sum as profit which has arisen since August 4, 1914, the plaintiffs are not entitled, in my judgment, to a declaration that under no circumstances can the defendants claim any profit which has arisen or been received after August 4, 1914.

Again, there is the alternative of interest, from which he is also excluded by the judgment. Under the circumstances before mentioned, probably a claim for interest would be the real and effective claim in the present case, and not profits. Upon what ground can it be maintained that the plaintiffs, having used the defendants' share of the partnership assets since the outbreak of war in carrying on the business, are under no obligation to pay interest in respect thereof? A debt which by law carries interest, and which is owing to an enemy does not cease to carry

interest by reason of the war, although the enemy cannot enforce payment until the return of peace. If the principal of the debt is not confiscated, why should the interest be confiscated? The learned judge below said, "Enemy property in this country is not to be confiscated"; yet the effect of the judgment is to confiscate the interest, as if the defendant had not been an enemy he could certainly have claimed interest. In *Wolff v. Oxholm* (1817), 6 M. & S. 92, the plaintiffs recovered against the defendant, who had formerly been an enemy, a large sum for interest which accrued during the war. In like manner interest must run in favour of an enemy during the war, although not then actually payable to him. "By Magna Charta merchant strangers are, upon the breaking out of a war, to be attached and kept without harm to body or goods, until it shall be known how the English merchants are treated by the sovereign of their State, and if the latter are safe there, the former are to be safe here. So that foreign merchants could suffer nothing in England unless by way of retaliation and reprisal": per Lord Ellenborough in *Wolff v. Oxholm*. Parliament has from time to time passed statutes dealing with the property of enemies in time of war from the same point of view. The statute 34 Geo. 3, c. 79 (1794), passed during the war with France, "was not an act of confiscation to the benefit of the State, but a measure of policy not less generous than lawful, by which at the same time that the transmission of money to the enemies of the State was prevented, the money itself was called in, secured, and kept for those to whom it was due, until the return of peace should enable them to receive it": per Lord Ellenborough in *Wolff v. Oxholm*.

Again, the Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), proceeds from the same point of view in providing for the appointment of a person to act as "custodian of enemy property." It recites that it is expedient to make further provision for preventing the payment of money to enemies, and for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies. It will be for Parliament to determine hereafter what is to be the ultimate disposition of such enemy money and property, which in the meantime is to be preserved. It is quite inconsistent with these provisions to hold that any rule of public policy requires or sanctions the confiscation to a British partner of interest which would otherwise be payable by him to an enemy partner. The public policy of this country

as declared by Parliament is that such interest should be "preserved with a view to arrangements to be made at the conclusion of peace." The Court is not entitled to invent a new head of public policy—*Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484, 491, per Lord Halsbury—and say that public policy requires that any interest of an enemy partner shall be forfeited to a British partner. The defendants' rights flow from the contract of partnership which was legal when entered into.

Recent legislation has prevented the occurrence of such a deadlock as was suggested in argument. By s. 4 of the Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. 5, c. 105), the Board of Trade may vest the interest of the defendants in the partnership and assets in the custodian, with full powers of selling, managing, or otherwise of dealing with it. A sale by the custodian under this statute of the enemy's interest in the partnership and assets and in any profits or interest would confer a good title upon the purchaser.

In my judgment the declaration which the plaintiffs have obtained is too favourable to them. The words "the value of" in the third declaration contained in the judgment should be struck out. Also the words "as of the date August 4, 1914," and also the words "and that the defendants are not entitled to any of the profits of or interest in the capital of the partnership since August 4, 1914." The appellants fail in their contention that war did not dissolve the partnership and succeed with regard to the declaration. Each party must be left to bear his own costs of the appeal.

Appeal allowed in part.

[BANKES L. J. read a concurring opinion. A. T. LAWRENCE J. dissented.]

ERTEL BIEBER AND COMPANY, Appellants v. RIO
TINTO COMPANY, Respondents.

THE HOUSE OF LORDS OF GREAT BRITAIN. 1918,
Law Reports [1918] A. C. 260.

Appeals from three orders of the Court of Appeal affirming judgments of Sankey J. [Only so much as relates to the first case is here given.]

The several appellants were German companies carrying on business in Germany.

The respondent company was incorporated in England and owned large mines of cupreous sulphur ore in Spain.

These appeals related to contracts entered into before the war for the supply by the respondents of cupreous sulphur ore to the several appellants, and the question for determination was whether such contracts had been entirely abrogated and avoided or whether they were merely suspended during the period of the war. . . .

In the first case, by an agreement of January 27, 1910, the respondents agreed to sell to the appellants 1,280,000 tons, 15 per cent. more or less in buyers' option, of cupreous sulphur ore to be shipped from Huelva in Spain between February 1, 1911, and November 30, 1914, and to be delivered ex ship in Rotterdam, Hamburg, Stettin, and/or other European Continental ports, except ports in Great Britain, France, Belgium, and Spain and Portugal; and by subsequent agreements the quantity of ore was increased by 105,000 and 50,000 tons. At the outbreak of the war on August 4, 1914, a substantial part of this ore still remained to be delivered.

By a further agreement of October 9, 1913, the respondents agreed to sell to the appellants 2,200,000 tons, 15 per cent. more or less in buyers' option, of cupreous sulphur ore to be shipped from Huelva between February 1, 1915, and November 30, 1919, on the same terms as before.

Each of these contracts contained a suspensory clause, which provided that if owing to strikes, war, or any other cause over which the sellers had no control, they should be prevented from shipping or delivering the ore, the obligation to ship and/or deliver should be suspended during the continuance of the impediment and for a reasonable time afterwards, and the clause contained a corresponding provision in favour of the buyers suspending their obligation to receive in the event of their being prevented from doing so by the like causes. . . .

On August 4, 1916, the respondents, pursuant to orders of Bray J., commenced actions under the Legal Proceedings against Enemies Act, 1915, against the several appellants claiming declarations that the contracts were abrogated and avoided by the existence of a state of war between Great Britain and Germany on August 4, 1914, and that the respondents were thereby released from any obligation to perform them, without

prejudice, however, to liabilities then already incurred.

Sankey J. held, on the authority of *Zinc Corporation v Hirsch*, [1916] 1 K. B. 541, that the contracts had become illegal and were dissolved and made the declarations asked for, and his decision was affirmed by the Court of Appeal (Pickford and Scrutton L. JJ. and Neville J.) . . .

LORD SUMNER. My Lords, there are two contracts, to which this appeal refers. Under the first, as enlarged by two indorsements, the last shipment was to be made by November 30, 1914. This contract was in course of execution when the present war began, and a substantial quantity still remains undelivered. Under the second deliveries were not to begin till February 1, 1915, and nothing has been done under it. Clause 21 provided that "all former contracts are to be considered as expired on March 1, 1915." Accordingly I do not propose to distinguish the first contract from what I have to say about the second. The appellants have raised two contentions, both of which are, I think, of the essence of their argument: (1.) that the effect of the outbreak of war depends on the particular terms of the contract in question, and not upon the general character of the class of contracts to which it belongs; and (2.) that the outbreak of war discharges further performance only where those terms necessarily involve commercial intercourse with the enemy. If the first proposition is not true, the particular terms of the contract are immaterial. If the second should be read "involves naturally or ordinarily" instead of "necessarily," then on the mere construction of this contract I think the argument fails. Even if clause 15 has full effect as a suspension, still it only suspends the sellers' obligation to ship and deliver, and does not cancel it. Clause 12 is left unaffected throughout, and under it declarations in writing would naturally be given by the buyers as soon as the end of the suspension drew near, even if there were not an annual obligation on them to do so, which I believe to be the better construction.

The rule of law which forbids a British subject to trade with the King's enemies is very ancient. Its effect upon trading contracts which, like the present, are executory on both sides was already well settled by the middle of the last century. *Esposito v. Bowden*, 7 E. & B. 763; 27 L. J. (Q. B.) 17, 19, finally answered the last of the questions which had been raised down to that time. The Court of Queen's Bench held that the charter was only dissolved on the outbreak of war if it could not pos-

sibly be performed without trading with the enemy, and in supporting this decision in the Court of Exchequer Chamber Mr. Manisty argued that the mere declaration of war did not rescind the executory contract in question; "it only suspends it, and renders it illegal where it cannot be performed in any legal manner." The Court of Exchequer Chamber first of all made it plain that the question was a general one, not dependent on the mere possibilities of the particular case, and that the occlusion of Odessa to Englishmen generally, by force of law, for an indefinite and presumably protracted time, could not be done away with by suggesting some possibility of a British ship loading cargo in that enemy port while somehow or other avoiding all contact with any enemy. Secondly, the Court decided in express terms that illegality does not suspend; it dissolves. What the law forbids is impossible of performance to those who owe obedience to that law, and this higher public obligation discharges any private obligation to the contrary.

Before 1914 I do not think that the theory upon which this dissolution is held to occur had been the subject of actual decision. The common law rule is much older than the development of over-seas commerce, and during last century the practical question raised was "how does the rule affect commercial contracts," and not "how is that effect to be stated and justified in terms of general jurisprudence." It occurred, however, within recent years to some ingenious mind, obviously with the desire to prefer private commerce to public principle, that a clause of suspension might secure to particular contracts that continued existence during war which the Exchequer Chamber had denied generally. To negotiate with an enemy towards the end of a war for the conclusion of a contract to sell and deliver goods as soon as peace should be signed would be a crime, but to stand bound to do so by a contractual tie throughout the war might possibly be lawful, if only the contract was concluded before the war with a provident eye to the possibility of its occurrence. Hence the disputes of which the present appeal is a type. Does a suspensory clause oust the application of the general rule?

My Lords, public policy, though a clue to the principle involved, is not in itself the key to the difficulty. The rule as to the dissolution of trading contracts on the outbreak of war, when they are executory on both sides, is said to exist for the purpose of assisting to cripple the enemy's commerce and of closing an avenue to illicit and traitorous correspondence. These

are, however, the practical advantages of the rule, not its basis in theory. Courts of law are not at liberty to apply the rule and dissolve a contract merely because they think its continuance disadvantageous to this country's belligerent policy. I think that public policy is a separate ground for deciding this particular case, but so far as trading with the enemy goes I wish to keep within what I conceive to be implicit in the old decisions upon the question.

My Lords, if upon public grounds on the outbreak of war the law interferes with private executory contracts by dissolving them, how can it be open to a subject for his private advantage to withdraw his contract from the operation of the law and to claim to do what the law rejects, merely to suspend where the law dissolves? The prohibition, which arises at common law on the outbreak of war, has for this purpose the effect of a statute. The choice between suspending and discharging the contract on the outbreak of war was quite deliberately made, and if occasionally the contract is said to be only suspended, or a Court refuses to dispose of a case on the ground of dissolution alone, this only brings into relief the fact that by an overwhelming preponderance of authority such trading contracts have been held to be dissolved on the outbreak of war. An appearance of authority to the contrary is sometimes found to be in truth a misreading of the language of a decision. Thus Lord Halsbury's use of the word "affected" in *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484, 493, is due to the fact that, by consent, the case had been tried as if the then war had terminated. The question was one of a cause of action, which had accrued one day before the outbreak of war and thereupon had been suspended as to the remedy only. Of course, if the war was treated as over, neither contract nor remedy was "affected." The policy was not an executory contract after war broke out so far as concerned the gold seized at Vereeniging at all. There can be no doubt that the matter must have been considered. To many people suspension seems to have much to recommend it. Freedom of contract is challenged less; the sacrosanctity of commerce is respected more. The Courts could not have adopted the rule of dissolution unless they had reasoned that suspension would be inconsistent with this principle of the law of contract. I will quote the language of Willes J. in *Esposito's Case*, 7 E. & B. 763, 792: "In all ordinary cases, the more convenient course for both parties seems to be that both should be at once

absolved, so that each, on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage or the shipment presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other opportunity of lawfully performing the contract perchance arising. The law upon this subject was doubtless made, according to the well-known rule, to meet cases of ordinary occurrence." To his mind I think it is clear that the rule was one made to provide certainty at the outbreak of war, where in itself everything is uncertain; that it was one made to apply generally, although taking its form from the needs of ordinary cases; and that, for the purpose of applying it, the case must be looked at as things stood when war broke out, and not as they were ascertained to be or as they ultimately happened during the interval before the trial of the action.

In the abstract, discharge of a contract by reason of the outbreak of war between the countries to which the parties respectively belong should be effected simply by operation of law independently of their arrangements. The rule sets the public welfare above private bargain. It does so for the safety of the State in the twofold aspect of enhancing the nation's resources and crippling those of the enemy. To hold that the parties may be allowed to make their own arrangements for attaining these ends and to set their private judgment, not untinged by considerations of their future interest, above the prescriptions of the public law would be anomalous. To say that for the purpose of preventing such intercourse the law generally determines stipulations which involve commercial intercourse between enemies, but when the parties have agreed not to hold any such intercourse is content to leave it to them, would indeed be rash. True, there is the criminal law against holding commercial intercourse with the enemy, but the offence is one not always easy to detect. In a matter of national safety the State cannot surely rely on the bare integrity and good faith of persons whose commercial interest may so strongly conflict with their public duty.

Though the contracts now in question are elaborate in form and grandiose in scale, they are not in their nature distinguishable from such a contract as that in *Esposito v. Bowden*, 7 E. & B. 763; 27 L. J. (Q. B.) 17. The latter was a charter; the former are contracts to sell goods and deliver them overseas under

many charters. "It is nowise important," says Story J. in *The Rapid* (1812), 1 Gall. 295, 309, "whether the property engaged in the inimical communication be bought or sold, or merely transported and shipped." Nor is it material that these contracts provide for a series of shipments and for deliveries by instalments. Chancellor Kent puts the very case of a contract to ship in instalments in *Griswold v. Waddington* (1819), 16 Johnson, Sup. Ct. New York, 438, 489, and dismisses it as indistinguishable from a contract for a single shipment. It is not for this purpose that each instalment can be treated as if it were the subject of a separate contract, or that instalments, which in point of date might fall to be delivered after the conclusion of peace, can be severed from the rest. The whole contract so far as it is mutually executory is dissolved. Again, the suspension of the right of suit in the case of enemy nationals, for causes of action already accrued, until the conclusion of peace is not an argument in favour of substituting suspension by agreement for discharge by operation of law. Whether it sounds in debt or in damages such a cause of action implies a present obligation to pay simultaneous with its coming into existence. Suspension of the remedy implies no continuance of the contract during the war, but only a recognition of its existence before the war as the basis or origin of a right, which, when it has accrued, is a chose in action, a form of property.

My Lords, in my opinion discharge by operation of law upon the outbreak of war operates upon trading contracts as a class by reason of their common characteristic of international intercourse, and is not prevented by special stipulations between the parties. It is not necessary for present purposes to define the term "trading" or the word "enemy." The class affected is not such contracts as contemplate a continuance of trading during war, but trading contracts as such, which are in being as mutually executory contracts at the outbreak of war, and would in ordinary course and circumstances import commercial intercourse. "War," says Lord Lindley in *Janson's Case*, [1902] A. C. 509, ". . . prohibits all trading with the enemy except with the Royal license, and dissolves all contracts which involve such trading." As the present case is one of such executory trading, I think the rule that such contracts are discharged upon the outbreak of war must apply.

There is another and independent ground on which this appeal may be disposed of. "We are all of opinion," says Lord

Alvanley C. J. in *Furtado v. Rogers*, 3 Bos. & P. 191, 198, speaking of a commercial contract operating after the outbreak of war though made before it, "that on the principles of the English law it is not competent to any subject to enter into a contract to do any thing which may be detrimental to the interests of his own country." If the principle of this decision be applied to the construction of these contracts, the suspensory clauses must be read as if they contained the words "an Anglo-German war always excepted"; in that case, under *Esposito v. Bowden*, 7 E. & B. 763; 27 L. J. (Q. B.) 17, the contracts became discharged. If on the other hand the above passage be applied and the suspensory clauses be read as the appellants contend, then in my opinion the contracts never were valid. They were void from the outset on grounds of public policy. It is incidental to the conduct of war that the Sovereign should be free to bring pressure to bear on the enemy by crippling his commerce and exhausting his resources; it is incidental to the conduct of war that the resources of the Sovereign's subjects should be free to be employed lawfully in preserving and extending the resources of the realm. It is further important to its conduct that there should be no clog on the Sovereign's power to impose his will on the enemy through fear of the inclusion of unfavourable economic conditions in any treaty of peace. The present contract involves large sums. Your Lordships were told that its future performance represents 10,000,000*l.* to the buyers, and it well may be so. Multiply these contracts, say, a hundredfold—no extravagant hypothesis—and what is the result on the conduct of the war? If these suspensory clauses are valid, the enemy knows three things: the first, that he may expend certain of his material resources without stint, for his right to replenish them in enormous quantities is assured at or shortly after the conclusion of peace; the second, that the present employment of these raw materials as British resources during the war, whether in the way of commerce or in the actual supply of combatant needs, is hampered by the existence of huge future commitments, performable at an uncertain and perhaps not distant date; the third, that he may rest assured that the imposition of commercial disadvantages in the treaty of peace is *pro tanto* neutralized, and that military resistance may be prolonged in proportion. I think it is plain, as it was thought by the Courts below, that such suspensive clauses as are in question here tend to defeat the successful conduct of the war on His

Majesty's part, and are therefore contrary to public policy and render the contracts void.

My Lords, I do not forget how limited is the extent to which Courts of law can guide their decisions by their views of public policy, nor am I insensible to the fact that in given circumstances, perhaps in circumstances as they are now, more profits may be lost by British than by enemy subjects, if all mutually executory trading contracts are discharged on the outbreak of war. How this may be, in my opinion a Court of law is not competent to inquire or decide. Is it to be guided by the sums involved, the profits in prospect, or the economic value of the particular commodity to the general commerce and industry of the nation? Is it to call upon private parties to give evidence of the existence of contracts (probably jealously concealed) to which others are parties and they are strangers? It is for the Executive to investigate and for the Legislature to provide for such possibilities. All that judges can do is to adhere to established rules, to ascertain their logical foundations, and to apply them impartially to disputed cases. . . .

Order of the Court of Appeal affirmed and appeal dismissed with costs.

[LORD DUNEDIN, LORD ATKINSON and LORD PARKER of Waddington delivered concurring opinions.]

NOTE.—The effect of the outbreak of war on existing contracts with alien enemies is one of great complexity, for much depends upon the form of the particular contract involved. Furthermore the question is primarily one of municipal rather than of international law and may be differently treated in different countries. It is universally recognized that a state may suspend and in some cases even abrogate contracts made by its subjects with alien enemies. The Anglo-American rule is that executory contracts made with alien enemies before the outbreak of war are suspended but not abrogated, but if the contract is one that is by nature incapable of suspension, as a partnership, *Griewold v. Waddington* (1818), 18 Johnson (N. Y.), 438; or one which involves trade with the enemy, *Esposito v. Bowden* (1857), 7 El. & B. 763; *The Teutonia* (1872), L. R. 4 P. C. 171; *The William Bagaley* (1867), 5 Wallace, 377; *Zinc Corporation v. Hirsch* (1915), L. R. [1916] 1 K. B. 541; or one in which time is of the essence, *New York Life Insurance Co. v. Statham* (1876), 93 U. S. 24; or one the performance of which is bound to inure to the benefit of the enemy, *Furtado v. Rogers* (1802), 3 B. & P. 191, the contract is entirely abrogated. In the case of a partnership an express agreement among the partners that the association shall not be dissolved by war is ineffective, *Mayer v. Garvan* (1920), 270 Fed. 229. A contract between English and German firms for

ninety-nine years with a provision for its suspension during such period as its operation should be prevented by "an unavoidable cause" was terminated by the outbreak of war between England and Germany since the suspension clause was against public policy. *Fried Krupp, A. G. v. Orcanera Iron Ore Co.* (1919), 35 T. L. R. 234. If postponement of performance of the contract alters the contract itself, it is dissolved by war, *Distington Hematite Iron Co. v. Possehl & Co.* (1916), L. R. [1916] 1 K. B. 811. It has been suggested that contracts between alien enemies the performance of which is made impossible by the outbreak of war are dissolved because of an implied condition to that effect, *Horlock v. Beal* (1916), L. R. [1916] 1 A. C. 486. Compare *Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co.* (1916), L. R. [1916] 2 A. C. 397.

For discussions of the effect of war on the most important kinds of contracts see *Esposito v. Bowden* (1857), 7 E. & B. 763, *Avery v. Bowden* (1855), 25 L. J. Q. B. 49, 26 L. J. Q. B. 3 (affreightment); *Ward v. Smith* (1869), 7 Wallace, 447, *United States v. Grossmayer* (1870), 9 Wallace, 72, *Washington University v. Finch* (1873), 13 Wallace, 106, *New York Life Insurance Co. v. Davis* (1877), 95 U. S. 425, *Williams v. Paine* (1898), 169 U. S. 55 (agency); *Brandon v. Curling* (1803), 4 East, 410, *The Jan Frederick* (1804), 5 C. Robinson, 128, *The Boedes Lust* (1804), 5 Ib. 233, *Furtado v. Rogers* (1802), 3 B. & P. 191, *Nigel Gold Mining Co. v. Hoade* (1901), 2 K. B. 849 (insurance of goods against capture); *W. L. Ingle, Lt., v. Mannheim Insurance Co.* (1914), L. R. [1914] 1 K. B. 227 (ordinary marine insurance); *Semmes v. Hartford Insurance Co.* (1871), 13 Wallace, 158 (fire insurance); *New York Life Insurance Co. v. Statham* (1876), 93 U. S. 24, *New York Life Insurance Co. v. Davis* (1877), 95 U. S. 425 (life insurance); *Antoine v. Morshead* (1815), 6 Taunton, 237 (negotiable instruments); *The William Bagaley* (1867), 5 Wallace 377, *Matthews v. McStea* (1875), 91 U. S. 7, *Douglas v. United States* (1878), 14 Ct. Cl. 1; *The Derfflinger* (No. 3), (*Egypt*, 1915), 1 Br. & Col. P. C. 643; *The Clan Grant* (1915), 1 Ib. 272; *Rossie v. Garvan* (1921), 274 Fed. 447 (partnership); *Tingley v. Müller* (1917), L. R. [1917] 2 Ch. 144 (power of attorney for sale of land). For a careful discussion of public policy as a ground for the voiding of contracts with alien enemies see the opinion of Justice McCardie in *Naylor, Benzon & Co. Lt. v. Krainische Industrie Gesellschaft* (1918), L. R. [1918] 1 K. B. 331.

In the case of an executed contract made with an alien enemy before the outbreak of war, and the performance is on his side, his remedy is suspended during the continuance of the war, *Alcinous v. Nigreu* (1854), 4 E. & B. 217; and so also of a debt due and payable to an alien enemy before the outbreak of war, *Ex parte Boussmaker* (1806), 13 Vesey, 71. But an alien residing in the country by leave of the Crown and probably a domiciled alien without a special license may sue during the war, *Wells v. Williams* (1697), 1 Salkeld, 45. It has even been held that a resident alien enemy, duly registered as such, may sue on a contract with a native citizen even though he is interned, since the restraint of internment does not in itself affect

his status, *Schaffeniuss v. Goldberg* (1915), L. R. [1916] 1 K. B. 284.

War touches the contractual relation of belligerents so acutely that much has been written upon it. The cases are well analyzed in Trotter, *The Law of Contract During and After War*; Campbell, *The Law of War and Contract, Including the Present War Decisions at Home and Abroad*; Phillipson, *The Effect of War on Contracts*; Leslie Scott, *The Effect of War on Contracts*; McNair, *Essays and Lectures upon Some Legal Effects of War*. See also Willson, "The Insurance of Foreign Property in War Time," *Law Quarterly Review*, XXXII, 373, XXXIII, 15; Hall, "The Effect of War on Contracts," *Columbia Law Review*, XVIII, 325; Borchard, sec. 46; Cobbett, *Cases and Opinions*, II, 67, 87; Hyde, II, 209; Moore, *Digest*, VII, 244.

SECTION 3. EFFECT OF WAR ON JUDICIAL REMEDIES.

HANGER v. ABBOTT.

SUPREME COURT OF THE UNITED STATES. 1868.
6 Wallace, 532.

Error to the Circuit Court for the Eastern District of Arkansas.

J. & E. Abbott, of New Hampshire, sued Hanger, of Arkansas, in assumpsit. The latter pleaded the statute of limitations of Arkansas, which limits such action to three years. The former replied the rebellion, which broke out after the cause of action accrued, and closed for more than three years all lawful courts. On demurrer, and judgment against it, and error to this court, the question here was simply, whether the time during which the courts in Arkansas were closed on account of the rebellion, was to be excluded from the computation of time fixed by the Arkansas statute of limitations within which suits on contracts were to be brought, there being no exception by the terms of the statute itself for any such case.

Mr. Justice CLIFFORD delivered the opinion of the court. . . .

Proclamation of blockade was made by the President on the nineteenth day of April, 1861, and, on the thirteenth day of July, in the same year, Congress passed a law authorizing the President to interdict all trade and intercourse between the inhabitants of the States in insurrection and the rest of the United States. 12 Stat. at Large, 1258-257.

War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects, or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy's country. The *William Bagaley*, 5 Wallace, 405; *Jecker et al. v. Montgomery*, 18 Howard, 111; *Wheaton on Maritime Captures*, 209. Upon this principle of public law it is the established rule in all commercial nations, that trading with the enemy, except under a government license, subjects the property to confiscation, or to capture and condemnation. The *Rapid*, 8 Cranch, 155; The *Hoop*, 1 Robinson Admiralty, 196.

Partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is in that case an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations, both public and private, which necessarily dissolves the relation, independent of the will or acts of the parties. *Maclachlan on Shipping*, 475; *Story on Partnership*, § 316; *Griswold v. Waddington*, 15 Johnson, 57; Same case, 16 Id. 438. Direct consequence of the rule as established in those cases is, that as soon as war is commenced all trading, negotiation, communication, and intercourse between the citizens of one of the belligerents with those of the other, without the permission of the government, is unlawful. No valid contract, therefore, can be made, nor can any promise arise by implication of law, from any transaction with an enemy. Exceptions to the rule are not admitted; and even after the war has terminated, the defendant, in an action founded upon a contract made in violation of that prohibition, may set up the illegality of the transaction as a defence. *Wilison v. Patteson*, 7 Taunton, 439. . . .

Executory contracts also with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war, which operates for that purpose with a force equivalent to an act of Congress. *Esposito v. Bowden*, 4 Ellis & Blackburne, 963; Same case, 7 Id. 763.

In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist, but it may well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times. Better opinion is that

executed contracts, such as the debt in this case, although existing prior to the war, are not annulled or extinguished, but the remedy is only suspended, which is a necessary conclusion, on account of the inability of an alien enemy to sue or to sustain, in the language of the civilians, *a persona standi in judicio*. 1 Kent's Com. (11th ed.), 76; Flindt v. Waters, 15 East. 260.

Trading, which supposes the making of contracts, and which also involves the necessity of intercourse and correspondence, is necessarily contradictory to a state of war, but there is no exigency in war which requires that belligerents should confiscate or annul the debts due by the citizens of the other contending party.

We suspend the right of the enemy, says Mr. Chitty, to the debts which our traders owe to him, but we do not annul the right. We preclude him during war from suing to recover his due, for we are not to send treasure abroad for the direct supply of our enemies in their attempt to destroy us, but with the return of peace we return the right and the remedy. Chitty on C. & M. 423. . . . Views of Mr. Wheaton are, and they are undoubtedly correct, that debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during war, are revived on the restoration of peace, unless actually confiscated in the meantime in the rigorous exercise of the strict rights of war, contrary to the milder rules of recent times. . . . Wheaton's International Law, by Lawrence, 541-877. . . .

When our ancestors immigrated here, they brought with them the statute of 21 Jac. 1, c. 16, entitled "An act for limitation of actions, and for avoiding of suits in law," known as the statute of limitations. . . . Such statutes exist in all the States. . . .

Persons within the age of twenty-one years, *femes covert*, *non compos mentis*, persons imprisoned or beyond the seas, were excepted out of the operation of the third section of the act, and were allowed the same period of time after such disability was removed. Just exceptions indeed are to be found in all such statutes, but when examined it will appear that they were framed to prevent injustice and never to encourage laches or to promote negligence. Cases where the courts of justice are closed in consequence of insurrection or rebellion are not within the express terms of any such exception, but the statute of limitations was passed in 1623, more than a century before it came to

be understood that debts due to alien enemies were not subject to confiscation. Down to 1737, says Chancellor Kent, the opinion of jurists was in favor of the right to confiscate, and many maintained that such debts were annulled by the declaration of war. Regarding such debts as annulled by war, the law-makers of that day never thought of making provision for the collection of the same on the restoration of peace between the belligerents. Commerce and civilization have wrought great changes in the spirit of nations touching the conduct of war, and in respect to the principles of international law applicable to the subject.

Constant usage and practice of belligerent nations from the earliest times subjected enemy's goods in neutral vessels to capture and condemnation as prize of war, but the maxim is now universally acknowledged that "free ships make free goods" which is another victory of commerce over the feelings of avarice and revenge. Individual debts, as a general remark, are no longer the subject of confiscation, and the rule is universally admitted that if not confiscated during the war, the return of peace brings with it both "the right and the remedy." *Wolf v. Oxholm*, 6 Maule & Selwyn, 92. . . .

Old decisions, made when the rule of law was that war annulled all debts between the subjects of the belligerents, are entitled to but little weight, even if it is safe to assume that they are correctly reported, of which, in respect to the leading case of *Prideaux v. Webber*, 1 Levinz, 31, there is much doubt. *Miller v. Prideaux*, 1 Keble, 157; *Lee v. Rogers*, 1 Levinz, 110; *Hall v. Wybourn*, 2 Salked., 420; *Aubrey v. Fortescue*, 10 Modern, 205, are of the same class, and to the same effect. All of those decisions were made between parties who were citizens of the same jurisdiction, and most of them were made nearly a hundred years before the international rule was acknowledged, that war only suspended debts due to an enemy, and that peace had the effect to restore the remedy. The rule of the present day is, that debts existing prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived with the restoration of peace. . . .

Text writers usually say, on the authority of the old cases referred to, that the non-existence of courts, or their being shut, is no answer to the bar of the statute of limitations, but Plowden says that things happening by an invincible necessity, though they be against common law, or an act of Parliament, shall not be prejudicial, that, therefore, to say that the courts were shut,

is a good excuse on voucher of record. Brooke, tit. Failure of Record; Blanshard on Limitations, 163; 6 Bacon's Ab. 395; 1 Plowden, 9 b. Exceptions not mentioned in the statutes have sometimes been admitted, and this court held that the time which elapsed while certain prior proceedings were suspended by appeal, should be deducted, as it appeared that the injured party in the meantime had no right to demand his money, or to sue for the recovery of the same; and in view of those circumstances, the court decided that his right of action had not accrued so as to bar it, although not commenced within six years. *Montgomery v. Hernandez*, 12 Wheaton, 129. But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the government, for which all the citizens are responsible. Unless the rule be so, then the citizens of a State may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close the courts, and to successfully resist the laws, until the bar of the statute becomes complete, which cannot for a moment be admitted. Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period. . . .

Judgment affirmed with costs.

RODRIGUEZ, Appellant v. SPEYER BROTHERS, Respondents.

HOUSE OF LORDS OF GREAT BRITAIN. 1918.

Law Reports [1919] A. C. 59.

Appeal from an order of the Court of Appeal reversing an order of Peterson J. in chambers.

The respondents carried on business in partnership as bankers in London until the outbreak of the war, when the partnership was *ipso facto* dissolved owing to one partner having become an alien enemy. There were five other partners, of whom four were British subjects and the fifth was an American citizen.

An action was commenced in 1916 by the respondents in the partnership name against the appellant for recovery of a debt alleged to have accrued before the war. Judgment was signed

by the respondents against the appellant in default of appearance, but this judgment was set aside by the Master upon the ground that the respondents had no right to sue, [because one of them, Eduard Beit von Speyer, was an alien enemy,] and the order of the Master was confirmed by Peterson J. The Court of Appeal, by a majority (Bankes L. J. and Sargant J., Pickford L. J. dissenting), set aside the orders of the Master and the learned judge, and remitted the case to the Master for rehearing on the merits. 87 L. J. (K. B.) 171. . . .

LORD FINLAY L. C. My Lords, the question in this case is whether a judgment signed against the present appellant, in default of appearance, should be set aside on the ground that one of the plaintiffs is an alien enemy. . . .

On the dissolution of the firm on the outbreak of the war the affairs of the partnership had to be liquidated, and this, of course, involved getting in the assets. For the purpose of the liquidation the firm still existed and the other partner had the right to use the name of Eduard Beit von Speyer in any litigation necessary for the purpose of getting in the assets. The writ was in the name of the firm, which had the same effect as if the names of the individual partners had been set out.

It was contended for the appellant that the respondents' action is incompetent, on the ground that Eduard Beit von Speyer is a co-plaintiff, and that an enemy alien cannot sue in the King's courts. This contention depends on the proposition that there is an inflexible rule of law against any action in the King's courts by an alien enemy suing either alone or together with others. Peterson J. at Chambers, and Pickford L. J. in the Court of Appeal, held that there is a settled rule of law to this effect, while Bankes L. J. and Sargant J. held that the rule does not apply in such a case as the present.

There is no doubt that, as a general rule, an alien enemy cannot bring an action in the King's courts as plaintiff, though he may, of course, be made a defendant. The rule seems to have its origin in two considerations. Firstly, that the subject of a country then at war with the King is in this country, unless he be here with the King's permission, *exlex*, and that he cannot come into the King's courts to sue any more than could an outlaw; and secondly, that the King's courts will give no assistance to proceedings which, if successful, would lead to the enrichment of an alien enemy, and therefore would tend to provide his coun-

try with the sinews of war. The rule is founded on public policy; but any such rule of law must be observed, even if there are circumstances in any particular case which make its enforcement contrary to public policy, and indeed detrimental to the interests of this country. If, however, there may be a state of circumstances in which to prevent an alien enemy from being a party to an action as plaintiff would do much more harm to British subjects or to friendly neutrals than to the enemy, this is a consideration most material to be taken into account in determining whether such a case falls within the true scope and extent of the rule. If the particular case is outside the rule, to apply it might be not merely contrary to public policy but also a mistake in law.

It was urged in support of the decision of the Court of Appeal in the present case that, where there is a firm consisting of British subjects and an alien who becomes an enemy on the outbreak of war, the partnership is *ipso facto* dissolved, and that to apply the supposed rule to such a case would cause great inconvenience and possibly most serious loss to the British members of the firm, by making it impossible for them to get in the firm's assets. The question raised is one of great interest, and involves a close inquiry into the precise nature and extent of the rule of law on the point.

One answer given to the argument *ab inconvenienti* was that the Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. 5, c. 105), has by s. 4 provided machinery by which this inconvenience may be obviated by vesting the interest of the enemy alien in the custodian appointed under the earlier statute of 5 Geo. 5, c. 12, who might join as a co-plaintiff so as to get in the assets. The question, however, must be considered apart from the effect of this Act, as the rule of law on the subject must have come into existence long before the passing of these Acts for the custody of enemy property, which have had the incidental effect of providing a method by which the difficulty in question might be got over. If the 5 & 6 Geo. 5, c. 105, had been passed specifically with the object of removing this difficulty, it would, of course, have afforded most cogent ground for the conclusion that the difficulty existed, but no such conclusion can be drawn from the fact that legislation of a general nature for the custody of enemy property may incidentally have this effect. I therefore propose to consider the question what the rule of law is, apart from the legislation of 1915 and 1916.

The proposition that an alien enemy cannot bring an action in this country has been often laid down. The question which now for the first time falls to be determined is whether the rule forbidding such an action during the continuance of the war is unqualified, and, in particular, whether it applies to a case in which, for the winding up of the affairs of a partnership dissolved by the outbreak of war, there is joined as a co-plaintiff one who, having been a partner when war broke out, thereon became an enemy alien. There is no doubt that, as a general rule, an action by an alien enemy might be met by a plea in abatement, while a contract made with an alien enemy during the war was void, and might be met by a plea in bar. But the general terms in which the rule has been laid down do not carry us very far in dealing with the special circumstances of the present case. The question is whether the rule applies so as to prevent British subjects during the war from recovering a debt which had been contracted in their favour jointly with one who has since become an enemy. It is obvious that, if the rule does extend to such a case, British partners could not get in their assets until the war was over. They would be non-suited for not having joined their co-contractor as a plaintiff if they left him out, and the action would be stopped by a plea in abatement or on summons if they put him in. . . .

The truth is that the rule was one directed against alien enemies and not against British subjects or friendly neutrals. Eduard Beit von Speyer is not, in point of law, a trustee, but he is under the obligation to concur in getting in the assets for the benefit of the firm, and there is no case in which the rule against an enemy alien being allowed to sue has been applied to a case in which he is suing not in his own interest, but because his concurrence is necessary for the protection of the interests of the firm. He is not, in point of law, suing *en autre droit*, but he is under a legal obligation to concur as a necessary party to an action which must be brought in the interests of the firm, and in these circumstances, in my opinion, his presence either as plaintiff or defendant gives rise to none of the objections which have been raised to suits by alien enemies. . . .

Upon the whole, my opinion is that the judgment of the Court of Appeal was right, and that this appeal should be dismissed with costs.

VISCOUNT HALDANE. My Lords, I think that the answer to the question raised by this appeal turns on a broad issue of prin-

ciple. Is the rule which prevents an enemy alien from suing in the King's courts a crystallised proposition which forms part of the ordinary common law, and is so definite that it must be applied without reference to whether a particular case involves the real mischief to guard against which the rule was originally introduced? Or is the rule one of what is called public policy, which does not apply to a particular instance if that instance discloses no mischief from the point of view of public policy? Now there are many illustrations of both kinds of rule. Since, for example, this House in 1833 gave its decision in *Cadell v. Palmer* (1833), 1 Cl. & F. 372, it has been clear that private property cannot for any reason, however good, be rendered inalienable for private ends beyond a period of lives in being and twenty-one years afterwards. And yet at one time this period was not defined, and the motive which led to its prescription in a definite form was that restraint on alienation was considered to be required by public policy. That this was the genesis of the restriction is shown by the fact that it has not been applied to charitable trusts where the public itself benefits by inalienability. Yet the rule has in other cases become a hard and fast one, to which no exception is tolerated to-day, for however excellent a reason. On the other hand, there are cases of a different kind, on which decisions have been given based merely on public policy accepted as matter of fact, and not on really legal principle, in a fashion which has always been made to depend on the particular circumstances of each case, and has rendered the question in reality one of fact for the Court, not the less that it was fact of which the Court would take judicial notice on its own initiative if necessary. Such were the cases on wagers in the days when they were enforced—cases in which, as was said by Parke B. in advising this House in *Egerton v. Earl Brownlow* (1853), 4 H. L. C. 1, 124: "Courts have been anxious to discountenance all wagers in which the parties have had no interest, and been astute, even to an extent bordering upon the ridiculous, to find reasons for refusing to enforce them." Thus a wager on the duration of the life of Napoleon was held void, because it might give the plaintiff an interest in keeping the King's enemy alive, and also on his death, because it might give the defendant an interest in compassing it by means other than lawful warfare: *Gilbert v. Sykes* (1812), 16 East, 150. Again, when a proprietor of carriages for hire in a town had made a bet that a particular person would go to

the assembly rooms in his own carriage and not in another's, it was considered that the bet was void, as possibly tending to hamper the freedom of a member of the public in choosing his own conveyance, and to expose him to the inconvenience of being importuned by rival coachmen: *Eltham v. Kingsman* (1818), 1 B. & Al. 683. It was true that in such cases the judges were, as the Lord Chief Baron said in advising in *Egerton v. Earl Brownlow*, 4 H. L. C. 151, "no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question, and declining to decide upon it." Nevertheless, it happens that the question to be so decided is not one of law as distinguished from ethics, and therefore, in *Egerton v. Earl Brownlow*, 4 H. L. C. 151, the majority of the Law Lords, including notably Lord St. Leonards, laid down that limitations in a devise under which the estates settled were to go over if the possessor for the time being did not acquire a dukedom were bad, simply because of a mischievous tendency which might result in improper attempts to influence the discretion of the Sovereign as the fountain of honour. It was certainly the opinions of men of the world, as distinguished from opinions based on legal learning, which guided this House to its conclusion in that appeal. It may, in a qualified sense, be true, as Lord Halsbury observed in *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 491, that the Courts cannot invent new heads of public policy, and that when it is said that things are unlawful because they are contrary to public policy, it is meant that they have either been enacted or assumed to be unlawful by the common law, and not because a Court has any right to declare them to be so. But the observation must be taken with the qualification that what the law recognises as contrary to public policy turns out to vary greatly from time to time. Since, for example, Hull J., as quoted in *Egerton v. Earl Brownlow*, 4 H. L. C. 238, was moved to anger at a bond with a condition that if the grantor did not for six months exercise his craft as a dyer within the town where he carried on business the bond should be void, and is reported to have said, "Per Dieu, if he were here, to prison he should go," the law must have altered much in the interval if Lord Halsbury's statement is to be taken literally.

My Lords, I think that there are many things of which the judges are bound to take judicial notice which lie outside the

law properly so called, and among those things are what is called public policy and the changes which take place in it. The law itself may become modified by this obligation of the judges. In *Nordenfeldt v. Maxim-Nordenfeldt Guns and Ammunition Co.*, [1894] A. C. 535, 553, the appellant had covenanted that he would not for twenty-five years engage, except on behalf of the respondents, to whom he had sold his business, in the manufacture of guns or ammunition. It was held by this House that although the covenant was unrestricted as to space it was not wider than was required for the protection of the company, and was not injurious to the public interest. As Lord Herschell pointed out, in early times all agreements in restraint of trade, whether general or restricted to a particular area, used to be held bad. Later on there grew up a distinction between covenants in general restraint and those in which the restraint was only partial. That attempts at general restraint were at one time regarded, under all circumstances, as void, in accordance with a rule which had been recognised as part of the law, he thought was true. But means of communication had so changed that the reason for the distinction was gone, and the proper view seemed to be that what was once a settled principle was no longer applicable in altered conditions. Lord Watson agreed. "A series of decisions," he said, "based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. . . . In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time." Lord Macnaghten put the same view in his own words, and cites the well-known judgment of Tindal C. J. in *Horner v. Graves* (1831), 7 Bing. 735, as showing that the real foundation of the distinction between partial and general restraints is, the desire to illustrate a rule which can only rest at last on what is a reasonable restraint with reference to the particular case. When the possibilities of communication became extended it was thus only a legitimate development—it was hardly even an extension—of the principle on which exceptions were first al-

lowed, to admit unlimited restraints into the class of allowable exceptions to the general rule.

My Lords, I think that the change in the view taken of the law as to covenants in restraint of trade, and the illustration it affords of the fashion in which decisions which were right in their time may cease to be of valid application, are highly instructive. For they show that between the class of cases in which, as in the instances of the rule against perpetuities, the law, although originally based on public policy, has become so crystallised that only a statute can alter it, and the different class, such as that of the cases relating to wagers, in which the principle of public policy has never crystallised into a definite or exhaustive set of propositions, there lies an intermediate class. Under this third category fall the instances in which public policy has partially precipitated itself into recognised rules which belong to law properly so called, but where these rules have remained subject to the moulding influence of the real reasons of public policy from which they proceeded. And I think that the decisive question before us is whether the doctrine of law which the Court of Appeal has dealt with in the present instance belongs to the first class or to the third. This is a point on which, in Lord Watson's language, the bare fact that decisions were given a long time ago cannot be conclusive. Before considering the question to which class the principle applied in the judgments before belongs I turn to the record to see what was actually decided in the case under appeal. . . .

My Lords, it will be observed that all that has been decided is that the action may proceed. Nothing has been settled as to what is to be done with the money if recovered, and it may still be directed to be paid into court or to the custodian. The question which goes to the root of the controversy is whether, under these circumstances, the Court of Appeal was right in deciding even as much as this. It is said that unless the action is allowed to proceed the liquidation of the partnership affairs cannot be concluded, as a substantial asset cannot be got in, and that the interests of British subjects and others unquestionably entitled to sue will be prejudiced. It is also said that the action is really brought as a mere step in the liquidation, as much as if it had been brought by a receiver in the name of the partners and for the purpose of realization out of the assets. As against this it is said that the action is no more than one by six joint contractors to recover a debt due to them jointly, and that, as the alien

enemy being one of those was bound to be a party, the action is not maintainable.

My Lords, if the question were one of mere convenience and to be decided by the test of whether the allowance of the action would result in injury to the public interests, I should have little hesitation in saying that it ought to be allowed. The legislation which has established the office and duties of the custodian provides ample means for insuring that the enemy partner should not enrich himself during the war if any balance from the sum sought to be recovered were to be adjudged recoverable, and it is not desirable that money due from a defendant who is living abroad should be delayed in recovery. But whether the question is one of convenience is irrelevant if the case belongs to the first of the classes to which I have referred—that in which the principle is so definitely crystallised as part of the common law that it is inadmissible, notwithstanding that the original foundation of the principle may have been the convenience of the State, to go behind the rule to see whether the reason for it applies in a particular case. In order to determine how the law stands on the point it is necessary to examine the authorities; for if these lay down the principle consistently and clearly as one of mere law, it would not be legitimate to act on the footing that Lord Watson did in the *Maxim-Nordenfeldt* case in regard to covenants in restraint of trade when he said that decisions based on grounds of public policy have not the same binding authority as decisions which “formulate principles which are purely legal.”

We know that when it was said in *Coke upon Littleton* (129b) that an “alien enemy shall maintain neither real nor personal action,” public policy had gone some way towards qualifying the harshness of the rule, although through the medium of a different tribunal. For in the time of *Littleton* it had already been laid down as to aliens who had come into England under the King’s safe conduct that their proper court was that of Chancery, for there “they are not bound to sue according to the law of the land nor to abide the trial by twelve men and other solemnities of the law of the land, but shall sue in the Chancery, and the matter shall be determined by the law of nature” (see *Pollock and Maitland’s History of English Law*, vol. 1, p. 465). As law and equity tended to approximate it is therefore not to be wondered at if the rule, which may well have originally been stringent in the common law tribunals with their

local traditions, and which was said to deny to an alien enemy all rights to invoke the assistance of the King's courts, became less definite. Indeed, as early as the time of Queen Elizabeth in *Brooks v. Phillips*, Cro. Eliz. 683, the enemy administrator of one who was presumably a subject of the Crown was allowed to sue. No doubt it was not desired by the common law judges to drive him into Chancery. But the decisions of this period are certainly not consistent, for in an anonymous case, Cro. Eliz. 142, the attempt by an enemy alien executor to bring an action of debt was disallowed, and in another case reported at p. 45 of Owen's Reports, 31 Eliz., the result was the same. In the later text books, such as Bacon's Abridgement (tit. "Alien"), the question is treated with distinctness as one of public policy, and as admitting in certain cases of doubt. In Comyns' Digest, on the other hand (sub tit. "Abatement"), it is said that a plea in abatement to the effect that even one of two of the plaintiffs is an enemy alien is a good plea.

The later authorities undoubtedly in many instances tend to treat the rule as one which had become a rigid principle of the common law, but they do not all of them tend in this direction. *Daubigny v. Davallon*, 2 Anst. 462; the dictum of Sir William Scott (unnecessary, however, for the decision) in *The Hoop*, 1 C. Rob. 196; *M'Connell v. Hector*, 3 B. & P. 113; and *Albrecht v. Sussmann*, 2 V. & B. 323, are all adverse to the title to sue. So is the judgment of Lord Kenyon C. J. in *Brandon v. Nesbitt*, 6 T. R. 23, and I think also the judgment in *Le Bret v. Papillon*, 4 East, 502. The former was an action on a marine policy by a British plaintiff, who, however, appeared on the record to have been an agent in effecting the policy for enemy aliens. It was strongly laid down that such an action would not lie, and having regard to things said in the course of the decisions I have just referred to it is not surprising that this should have been so.

On the other hand, in *Flindt v. Waters*, 15 East, 260, 265, where a British agent had effected a policy of insurance on behalf of alien enemies who were not so at the time of the loss but had become so before action brought, Lord Ellenborough C. J. laid down the law more guardedly. "The defence," he said, "of alien enemy must be accommodated to the nature of the transaction out of which it arises: it may go to the contract itself on which the plaintiff sues, and operate as a perpetual bar; or the objection may, as in a case of this sort, be merely personal, in respect to the capacity of the party to sue upon it. Here the

objection is taken upon the general issue, which is a plea of a perpetual bar, and if found against the plaintiff, would have excluded him for ever: so that though peace should be established to-morrow between the two countries, and the Crown should not have interfered to seize the debt, yet on this plea in bar the plaintiff would have been for ever estopped to sue for his debt. But here the objection is only of a temporary nature: the contract itself was perfect at the time it was made: the trade was with an alien friend." As the cause of action had arisen before the assured became alien enemies, and was only temporarily suspended, the Court thought that the supposed rule was not one which applied with such rigidity as to create a perpetual bar, and on the plea of the general issue it was therefore treated as not applying.

Ex parte Boussmaker, 13 Ves. 71, is a case in which an analogous view was taken by Lord Erskine L. C., for he allowed an enemy alien to invoke the assistance of Chancery by a petition to prove a debt under a commission of bankruptcy because the contract under which the debt arose had been entered into in time of peace, and the title to the debt would therefore become enforceable when peace came. The remedy was only suspended, and the dividend should therefore be reserved. In *Daubuz v. Morshead*, 6 Taunt. 332, Gibbs C. J. held that the plaintiff, although trustee for an alien, was entitled to a judgment for money, but added that he could not say what the Crown might not do to lay hands on the money. On the other hand, Lord Campbell C. J. (*Alcinous v. Nigreu*, 4 E. & B. 217), allowed a plea *puis darrein continuance* that the plaintiff had become an alien enemy. The right of action was held to be suspended during the war.

My Lords, while I think that the preponderance of authority down to this date has tended to this treatment of the rule as a rule of ordinary law and not as a mere case of applying policy, the Courts have been, as I have shown, by no means unanimous, and I do not think that the course of subsequent decision has materially affected this conclusion. The careful and elaborate judgment of Lord Reading C. J. in *Porter v. Freudenberg*, [1915] 1 K. B. 857, is in favour of the view that the rule is a rigid one. *Candilis & Sons v. Victor & Co.*, 33 Times L. R. 20, was decided in the same sense. On the other hand, in *Mercedes Daimler Motor Co. v. Maudslay Motor Co.*, 31 Times L. R. 178, and in *Rombach v. Gent*, 31 Times L. R. 492, *Warrington J.* and

Lush J. respectively appear to have taken the other view.

My Lords, under these circumstances I am of opinion that it is open to us, as a supreme tribunal unfettered by any decision of its own, to look at the reason of the rule invoked. If we can do this I agree with the majority in the Court of Appeal that it is premature to stop the action at this stage from proceeding. And I think that if this be so the balance of public convenience is in favour of allowing the respondent firm to get in this debt if on the merits they can. Should they succeed in doing so I am far from implying that any share of it should be paid out as part of the assets to be realised in taking the account to the enemy partner. But, so far as the decision of the Court of Appeal at present extends, it seems to me to have been right.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

[Lord Parmoor delivered an opinion concurring with Lord Finley and Lord Haldane. Lord Sumner delivered an exhaustive opinion, in which Lord Atkinson concurred, in which he took the ground that the ancient rule by which an enemy plaintiff is excluded from the courts is so well established that it can be altered only by legislation.]

PORTER v. FREUDENBERG.

COURT OF APPEAL OF ENGLAND. 1915.
Law Reports [1915] 1 K. B. 857.

[The defendant, a German subject resident in Berlin, maintained a business establishment in London, which was carried on by his agent Barnes on premises leased from the plaintiff. On September 28, 1914, Barnes delivered the keys of the premises to the plaintiff and the next day removed the whole of the defendant's stock, fixtures and fittings. The plaintiff notified Barnes that the premises would be held at his disposal as agent of the defendant, and then brought suit for a quarter's rent. The trial justice gave leave to issue a concurrent writ, and to serve notice of it upon the defendant at Berlin. As such service was impracticable, the plaintiff appealed and asked for leave for substituted service of notice of the writ upon the defendant's agent in England.]

LORD READING, C. J. . . . Having now explained the meaning of "alien enemy" for civil purposes, and having decided that such alien enemy's right to sue or proceed either by himself or by any person on his behalf in the King's Courts is suspended during the progress of hostilities and until after peace is restored . . . the next point to consider is whether he is liable to be sued in the King's Courts during the war. To allow an alien enemy to sue or proceed during war in the civil Courts of the King would be, as we have seen, to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy. *Prima facie* there seems no possible reason why our laws should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects. The rule of the law suspending the alien enemy's right of action is based upon public policy, but no consideration of public policy is apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. As was said by Bailhache, J., in *Robinson & Co. v. Continental Insurance Co. of Mannheim*, [1915] 1 K. B. 155, 159, "To hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule." In our judgment the effect would be to convert that which during war is a disability, imposed upon the alien enemy because of his hostile character, into a relief to him during war from the discharge of his liabilities to British subjects. It is very noteworthy that when dealing with the rights of alien enemies there is no shadow of doubt suggested in the books as to the right to sue alien enemies. More often there is no mention of it, but sometimes it is the subject of express reference and then always to the same effect, that the alien enemy can be sued during the progress of hostilities. Bacon's *Abridgement*, 7th ed., vol. 1, p. 183, asserts this liability of the alien enemy without doubt or hesitation. "The plea of 'alien enemy' is a bar to a bill for relief in equity as well as to an action at law, but it would seem not sustainable to a mere bill for discovery for as an alien enemy may be sued at law and may have process to compel the appearance of his witnesses so he may have the

benefit of a discovery." This is an important passage in other respects also, and in our judgment it is a correct statement of the law. . . .

The Supreme Court of the United States had to consider the position of an alien enemy defendant in *McVeigh v. United States* (1871), 11 Wallace, 259. The United States, under a statute then in force, filed a libel of information in the District Court of Virginia for the forfeiture of certain real and personal property of McVeigh on the ground that he was "a resident of the City of Richmond within the Confederate lines and a rebel." McVeigh appeared by counsel and filed a claim to the property and an answer. The Attorney of the United States moved that the claim and answer and appearance be stricken from the files, and the Court granted the motion and the decree was made for forfeiture of the property. The case eventually was brought to the Supreme Court on writ of error. Swayne, J., in delivering the judgment of the court, said: "The order in effect denied the respondent a hearing. It was alleged he was in the position of an alien enemy and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. . . . Whether the legal status of the plaintiff in error was or was not that of an alien enemy is a point not necessary to consider; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the Courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence." The learned judge relied upon the above mentioned passage in Bacon's Abridgement as an authority for this proposition, and the Supreme Court acted upon it by reversing the judgment of the District Court and the Circuit Court. . . .

Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence, and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.

Equally it seems to result that, when sued, if judgment proceeded against him, the appellate Courts are as much open to him as to any other defendant. It is true that he is the person who may be said in one sense to initiate the proceedings in the appellate Court by giving the notice of appeal, which is the first necessary step to bring the case before that Court; but he is entitled to have his case decided according to law, and if the judge in one of the King's Courts has erroneously adjudicated upon it he is entitled to have recourse to another and an appellate Court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant. The decision in *McVeigh v. United States* (1871), 11 Wallace, 259, in the Supreme Court of the United States is to the same effect. In that case the defendant, who was appellant in the circumstances already stated, brought writ of error in respect of the judgment of the District and Circuit Courts and succeeded in reversing the judgments of those Courts.

We must now consider whether the same conclusion is reached in reference to appeals by an alien enemy plaintiff, that is, a person who before the outbreak of war was a plaintiff in a suit and then by virtue of his residence or place of business became an alien enemy. As we have seen, he could not proceed with his action during the war. If judgment had been pronounced against him before the war in an action in which he was plaintiff, can he present an appeal to the appellate Courts of the King? We cannot see any distinction in principle between the case of an alien enemy seeking the assistance of the King to enforce a civil right in a Court of first instance and an alien enemy seeking to enforce such right by recourse to the appellate Courts. He is the "actor" throughout. He is not brought to the Court at the suit of another, it is he who invokes their assistance; and it matters not for this purpose that a judgment has been pronounced against him before the war. When once hostilities have commenced he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the Courts in motion. If he had given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace. . . .

ALFRED HUGO POSSELT ET AL. v. R. SEABURY
D'ESPARD ET AL.COURT OF CHANCERY OF NEW JERSEY. 1917.
87 N. J. Eq. 571.

On bill. On order to show cause. . . .

LANE, V. C. A preliminary objection is made to the prosecution of the cause upon the ground that the complainants are alien enemies. The facts are conceded. The individual complainant is a subject of Germany, resident in this country, and has taken out his first papers. The corporation complainant is a subject of, and resident in, Germany. The bill is for the preservation of the rights of the complainants as stockholders in a New Jersey corporation and also in the interest of the New Jersey corporation for the protection of its rights against the action of the defendants. The German corporation is a majority stock holder, practically the owner, of the New Jersey corporation. The charge is that the defendants have deliberately set about to wreck the New Jersey corporation. No money decree is prayed for. If I should deny relief upon the ground stated by the defendants, then the property of alien enemies within this country, acquired in time of peace, may be ruthlessly taken away from them, not by the government, but by individuals, subject only to the restraint of criminal law. I am familiar, of course, with the very many learned opinions of publicists of other days, and also with the opinions of the supreme court of the United States, but I think that at this time to attempt to consider them in detail would unduly extend this opinion, and in the view that I take of the present situation, would be wholly unwarranted. The right of government to confiscate property of alien enemies and close the doors of its courts to them, whether resident here or elsewhere, may be conceded. Whether that right is to be exercised is a matter of policy. The modern trend is to discourage interference with property rights, whether of friends or enemies in time of war, except so far as may be necessary to effectively accomplish the objects of the war. The solution of the problem now before me, I think, is found in the president's message to Congress, which, in view of the nature of its reception by Congress and the action of Congress under it, has become the voice of the country; and the president's

proclamation declaring a state of war and defining rights of residents, an official act under authority of Congress. German residents who comply with needful regulations, and who properly conduct themselves, are assured that they will be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States. To shut the door of the court in the face of an alien enemy resident here would be a distinct violation of not only the spirit but the letter of this proclamation.

With respect to the alien enemy resident in Germany the situation is somewhat different, but I think not essentially so. The president has very carefully distinguished between the German government and the German people, and the sins of that government ought not to be visited upon the people except so far as the legitimate interests of the United States require. I am convinced that there is no interest of the United States which requires the court, in advance of a definite command by the constituted authorities, to refuse to protect, at their instance, the rights of alien enemies resident abroad in property in this country. If it be said that this is in conflict with certain prior decisions, the answer is that the solution of the question depends upon public policy, and while it is not the function of the court to establish a public policy, it is the function and the duty of the court to determine, as a matter of fact, what the policy actually is, and it is the policy of the present day, not that of some years ago, that must be determined. Tolerance is the keynote of the president's proclamation, and by that I am bound. If the contention is made that to permit alien enemies resident abroad to sue in our courts would be to lend aid and comfort to the enemy, I think the answer is that either the court or the government may so act as to prevent any property coming into possession of the enemy. I am unwilling to concede that either the government or the courts are powerless to prevent aid and comfort being given to the enemy without exercising the drastic power of refusing absolutely at the instance of an alien enemy to protect property rights within this country. I think the doors of the court are still open to all persons who properly behave themselves.

The result is that the motion to stay the prosecution of this cause on the ground of alien enemy will be denied.

NOTE.—There is no rule of international law as to the rights and privileges accorded to an alien enemy in the tribunal of a belligerent. This is purely a question of municipal law and is to be determined by each country in accordance with its own views as to the requirement of national policy. In England it has apparently always been the rule that the courts were closed to an alien enemy abiding in his own country, but as early as 1454 it was held that if an alien enemy came into England under license and safe conduct he could maintain an action against any one who broke into his house and took away his goods, 32 Y. B. Henry VI, fol. 23, b 5, cited by Hyde, II, 216. Likewise in *Wells v. Williams* (1697), 1 Lord Raymond, 282, the court said:

If an alien enemy comes hither *sub salvo conductu*, he may maintain an action; if an alien enemy come hither in time of peace, *per licentiam domini regis* as the French Protestants did, and lives here *sub protectione*, and a war afterwards begins between the two nations, he may maintain an action; for suing is but a consequential right of protection; and therefore an alien enemy that is here in peace under protection, may sue a bond; *aliter* of one commorant in his own country.

A century later, Lord Stowell in *The Hoop* (1799), 1 C. Robinson, 196, declared:

In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour.

He indicated however that there might be circumstances which would relieve the alien of his enemy character, "such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*". Shortly afterward Chancellor Kent gave emphatic utterance to the governing principle when he said in *Clarke v. Morey* (1813), 10 Johnson (N. Y.), 69:

A lawful residence implies protection and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy no less than to justice and humanity.

The English courts, however, did not adopt Kent's view that if an alien was lawfully residing in the kingdom he had capacity to sue. This was denied in *Alciator v. Smith* (1812), 3 Campbell, 245, and in *Alcinous v. Nigreu* (1854), 4 E. & B. 217. But the effect of these decisions has been largely nullified by the recent cases in which it has been held that registration according to law carries with it the protection of the government, *Princess of Thurn und Taxis v. Moffitt* (1914), L. R. [1915] 1 Ch. 58, and is evidence of license to remain, *Porter v. Freudenberg* (1915), L. R. [1915] 1 K. B. 857. The

same rule has been applied in Scotland, *Schulze, Gow & Co. v. Bank of Scotland* (1914), 2 S. L. T. 455; in Ireland, *Vokl v. Governors of Rotunda Hospital* (1914), L. R. [1914] 2 I. R. 543; in Quebec, *Viola v. MacKenzie, Mann & Co.* (1915), 24 Que. K. B. 31; in Manitoba, *Peskovitch v. Western Canada Flour Mills Co. Ltd.* (1914), 24 Manitoba, 763; in South Africa, *Stern & Co. v. De Waal* (1915), So. Af. L. R. [1915] Transvaal, 60; and apparently in India, *Husselne v. Weichers* (1914), 7 Sind Law Rep. 329. For a good discussion of the early cases see the opinion of Justice Story in *Society for the Propagation of the Gospel v. Wheeler* (1814), 2 Gallison, 105.

The rule laid down by Chancellor Kent in *Clarke v. Morey* (1813), 10 Johnson (N. Y.), 69, has generally been followed in the United States. A suit brought before the outbreak of war by alien enemies resident in Germany but which was pending when hostilities began was not dismissed but proceedings were suspended until the return of peace, *Plettenburg, Holthaus & Co. v. Kalmon* (1917), 241 Fed. 605. The libel brought against a ship by an alien enemy for wages was not dismissed, but was continued until the end of the war, *The Oropa* (1919), 255 Fed. 132. See also *Stumpf v. Schreiber Brewing Co.* (1917), 242 Fed. 80; *Speidel v. N. Barstow Co.* (1917), 243 Fed. 621; *Estate of Henrichs* (1919), 180 Cal. 175; *Heller v. Goodman's Motor Express Van and Storage Co.* (1918), 92 N. J. Law, 415.

In *Birge-Forbes Company v. Heye* (1920), 251 U. S. 317, 323, Mr. Justice Holmes said:

The plaintiff had got his judgment before war was declared, and the defendant, the petitioner, had delayed the collection of it by taking the case up. Such a case was disposed of without discussion by Chief Justice Marshall speaking for the Court in *Owens v. Hannay*, 9 Cranch, 180. *Kershaw v. Kelsey*, 100 Massachusetts, 561, 564. There is nothing "mysteriously noxious". (*Coolidge v. Ingles*, 13 Massachusetts, 26, 37) in a judgment for an alien enemy. Objection to it in these days goes only so far as it would give aid and comfort to the other side. *Hanger v. Abbott*, 6 Wall. 532, 536. *M'Connell v. Hector*, 3 B. & P. 113, 114. Such aid and comfort were prevented by the provision that the sum recovered should be paid over to the Alien Property Custodian, and the judgment in this respect was correct. When the alien enemy is defendant justice to him may require the suspension of the case. *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 248 U. S. 9, 22.

The exclusion of an enemy claimant from appearance before a prize court in proceedings in which his property rights are being adjudicated seems to be confined to Anglo-American jurisdictions, *Nys, Le Droit International*, III, 150, and has met with much criticism. In *The Gutenfels* (Egypt, 1915), 1 Br. & Col. P. C. 102, an indignant judge said:

The fact is that the rule is a bad rule, much more to be honoured in the breach than in the observance; and if we

must acknowledge ourselves to be so far fettered by the dead hand of outworn precedent as to recognize its continued existence, I am, at any rate, determined to permit all such breaches of it as my sense of equity and fair dealing towards the enemy may demand.

In *The Möwe* (1914), L. R. [1915] P. 1, Sir Samuel Evans declared that whether an enemy claimant should be allowed to appear was purely a question of practice, and in ordering that any enemy claimant who conceives that he is entitled to any privilege or relief under any Hague Convention should be allowed to appear and present his claim, his Lordship used these words:

Practice should conform to sound ideas of what is fair and just. When a sea of passions rises and rages as a natural result of such a calamitous series of wars as the present, it behooves a Court of justice to preserve a calm and equable attitude in all controversies which come before it for decision, not only where they concern neutrals, but also where they may affect enemy subjects. In times of peace the Admiralty Courts of this realm are appealed to by people of all nationalities who engage in commerce upon the sea, with a confidence that right will be done. So in the unhappy and dire times of war the Court of Prize as a Court of justice will, it is hoped, show that it holds evenly the scales between friend, neutral, and foe.

It is not doubted that alien enemies may be sued. Some jurists however have argued that such suits would be unjust to the enemy since he could not be allowed for reasons of public policy to make an adequate defense. This consideration has either been ignored or has been met by a suspension of proceedings until the return of peace. In the older cases the point of view of the court has been like that expressed in *Hastings v. Blake* (1596), Noy, 1, where it was said:

Men attaint or outlawed shall be put to answer in any action against them, because it is to their prejudice. But in an action brought by them they shall not be answered, because it is to their benefit.

For further discussion of suits against alien enemies see *Hall v. Trussell* (1603), Moore, 753; *Ramdsen v. Macdonald* (1748), 1 Wilson, 217; *Daubigny v. Davallon* (1794), 2 Anstruther, 462; *Ex parte Bousmaker* (1806), 13 Vesey, 71; *Albrecht v. Sussman* (1813), 2 V. & B. 323; *Barrick v. Buba* (1857), 2 C. B. (N. S.) 563; *Dorsey v. Kyle* (1869), 30 Maryland, 512; *McVeigh v. United States* (1870), 11 Wallace, 259; *Masterson v. Howard* (1873), 18 Wallace, 99; *De Jarnette v. De Giverville* (1874), 56 Missouri, 440; *Ex parte Savage* (1914). South Africa L. R. [1914], C. P. D. Part I, 827; *Robinson & Co. v. Continental Insurance Co. of Mannheim* (1914) L. R. [1915] 1 K. B. 155; *Halsey v. Lowenfeld* (1915), L. R. [1916] 1 K. B. 143; In re

Stahlwerk Becker Aktiengesellschaft's Patent (1917), L. R. [1917] 2 Ch. 272.

In accord with *Hanger v. Abbott* (1868), 6 Wallace, 532 as to the effect of war on the Statute of Limitations are *Hoare v. Allen* (1789), 2 Dallas (Penn.), 102; *United States v. Wiley* (1871), 11 Wallace, 508; *The Protector* (1872), 12 Ib., 700; *Semmes v. Hartford Insurance Co.* (1872), 13 Ib. 158; *Brown v. Hiatts* (1873), 15 Ib. 177. Whether *Hanger v. Abbott* would be followed in Great Britain is doubtful. *Westlake* (II, 49), *Pollock* (*Contracts*, 86), and *Phillipson* (*Effect of War on Contracts*, 76) support it, but there is a dictum to the contrary in *De Wahl v. Braune* (1856), 1 H. & N. 178, which is adopted by *Anson* (*Contracts*, 129) and *Lord Lindley* (*Company Law*, I, 53). Parliament however has recognized the principle involved, and in 6 & 7 Geo. V. ch. 18, sec. 3 it is provided that where a person is prevented from building on a site because of circumstances of the war or by public authority, the courts, if there is danger that adjacent owners may acquire a right to light by prescription, may suspend the running of the period of prescription, and such period of suspension is excluded in computing the period required for the acquisition of a right to light by prescription. See *In re City of London Real Property Co., Ltd.*, [1917] W. N. 183.

Analogous to the effect of war on the running of the Statute of Limitations is the effect of war on the running of interest on debts during the period in which the debtor and creditor, subjects of enemy states, are forbidden to have intercourse, and hence the payment of interest from one to the other is unlawful. Authority is divided, but seems to favor the rule that interest does not run when the debtor and creditor are separated by the line of war. See *Du Belloix v. Lord Waterpark* (1822), 1 Dowling and Ryland, 16; *Brown v. Hiatts* (1873), 15 Wallace, 177; *Padgett v. Chothia* (1916), 18 Bombay L. R. 190; *In re Fried Krupp Actien-Gesellschaft* (1917), L. R. [1917] 2 Ch. 188. The subject is fully treated by C. N. Gregory, "Interest on Debts where Intercourse between Debtor and Creditor is forbidden by a State of War," *Law Quar. Rev.*, XXV, 297.

On the effect of war on judicial remedies see a note by E. M. Borchard in *Yale Law Journal*, XXVII, 104; notes in *Harvard Law Review*, XXXI, 470, XXXII, 737; Pellizi, "Les Sujets Ennemis devant les Tribunaux en Italie," *Clunet*, XLVI, 80, 659; McNair, *Essays and Lectures upon Some Legal Effects of War*; Page, *War and Alien Enemies*; Baty and Morgan, *War: its Conduct and Legal Results*; Garner, *International Law and the World War*; Hyde, II, 216; Moore, *Digest*, VII, 244.

CHAPTER XIV.

WAR RIGHTS AS TO PRIVATE PROPERTY.

SECTION 1. PRIVATE PROPERTY ON LAND.

ARMITZ BROWN v. THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1814.
8 Cranch, 110.

[The *Emulous*, owned by citizens of the United States, was chartered to a British company to carry a cargo from Savannah, Georgia, to Plymouth, England. Having been detained in port by the embargo of April 4, 1812, the vessel proceeded to New Bedford, Massachusetts. War was declared in June, 1812, and some months later the cargo was unloaded, and in November, 1812, part of it was sold to the claimant, who was an American citizen. In April, 1813, the attorney of the United States, apparently on his own motion, seized and libeled that part of the cargo which had been sold to the claimant. The District Court dismissed the libel, but the Circuit Court, Justice Story presiding, reversed the sentence, and the claimant appealed.]

MARSHALL, Ch. J., delivered the opinion of the Court. . . .

The material question made at bar is this. Can the pine timber, even admitting the property not to be changed by the sale in November, be condemned as prize of war?

The cargo of the *Emulous* having been legally acquired and put on board the vessel, having been detained by an embargo not intended to act on foreign property, the vessel having sailed before the war, from Savannah, under a stipulation to re-land the cargo in some port of the United States, the re-loading having been made with respect to the residue of the cargo, and the pine timber having been floated into shallow water, where it was secured and in the custody of the owner of the ship, an American citizen, the Court cannot perceive any solid distinc-

tion, so far as respects confiscation, between this property and other British property found on land at the commencement of hostilities. It will therefore be considered as a question relating to such property generally, and to be governed by the same rule.

Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the Court.

The questions to be decided by the Court are:

1st. May enemy's property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war?

2d. Is there any legislative act which authorizes such seizure and condemnation?

Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy found within our territory, at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask,

Is the declaration of war such a law? Does that declaration, by its own operation, so vest the property of the enemy in the government, as to support proceedings for its seizure and confiscation, or does it vest only a right, the assertion of which depends on the will of the sovereign power?

The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation.

Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction; and, although, in practice, vessels with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land,

which were acquired in peace in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the right of war. But although the practice in this respect may not be uniform, that circumstance does not essentially affect the question. The enquiry is, whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends on the national will: and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts and other property found in the country must be the same. What then is this operation?

Even Bynkershoek, who maintains the broad principle, that in war everything done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, or even poison, may be employed against him; that a most unlimited right is acquired to his person and property; admits that war does not transfer to the sovereign a debt due to his enemy; and, therefore, if payment of such debt be not exacted, peace revives the former right of the creditor; "because," he says, "the occupation which is had by war consists more in fact than in law." He adds to his observations on this subject, "let it not, however, be supposed that it is only true of actions, that they are not condemned *ipso jure*, for other things also belonging to the enemy, may be concealed and escape condemnation."

Vattel says, that "the sovereign can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration."

It is true that this rule is, in terms, applied by Vattel to the property of those only who are personally within the territory at the commencement of hostilities; but it applies equally to things in action and to things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest the property of the enemy in the sovereign, his presence could not exempt it from this operation of war. Nor can a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others

Chitty, after stating the general right of seizure, says, "But, in strict justice, that right can take effect only on those possessions of a belligerent which have come to the hands of his adversary after the declaration of hostilities."

The modern rule then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property.

This rule appears to be totally incompatible with the idea, that war does of itself vest the property in the belligerent government. It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to the exercise of this right.

The constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us. . . .

One view, however, has been taken of this subject which deserves to be further considered.

It is urged that, in executing the laws of war, the executive may seize and the Courts condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an act of the legislature to justify the condemnation of that property which, according to modern usage, ought not to be confiscated.

This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

The rule is, in its nature, flexible. It is subject to infinite

modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.

Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.

It appears to the Court, that the power of confiscating enemy property is in the legislature, and that the legislature has not declared its will to confiscate property which was within our territory at the declaration of war. The Court is therefore of opinion that there is error in the sentence of condemnation pronounced in the Circuit Court in this case, and doth direct that the same be reversed and annulled, and that the sentence of the District Court be affirmed.

[MR. JUSTICE STORY dissented on the ground that the confiscation of enemy property had been authorized by Congress. In his dissenting opinion the learned judge incorporated the opinion which he had rendered in the case in the Circuit Court.]

JURAGUA IRON COMPANY, LIMITED, v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1909.
212 U. S. 297.

Appeal from the Court of Claims.

[The plaintiff, a Pennsylvania corporation having its principal office and place of business in Philadelphia, owned mines and other works in Cuba, together with real estate upon which stood 66 buildings used chiefly as dwellings for its employees. In 1898, while the war between the United States and Spain was in progress, the lives of the American troops who were en-

gaged in military operations in the Province of Santiago de Cuba were endangered by the prevalence of yellow fever. As a means of protection General Miles ordered "all places of occupation or habitation which might contain the fever germs" to be destroyed. In accordance with this order, the 66 buildings belonging to the plaintiff were burned and it suffered damage to the amount of \$31,166, for the recovery of which this suit was brought. The Court of Claims denied any liability on the part of the United States, and the plaintiff appealed.]

MR. JUSTICE HARLAN delivered the opinion of the court. . . .

It is to be observed at the outset that no fact was found that impeached the good faith, either of General Miles or of his medical staff, when the former, by the advice of the latter, ordered the destruction of the property in question; nor any fact from which it could be inferred that such an order was not necessary in order to guard the troops against the dangers of yellow fever. It is therefore to be assumed that the health, efficiency and safety of the troops required that to be done which was done. Under these circumstances was the United States under any legal obligation to make good the loss sustained by the owner of the property destroyed? . . .

The plaintiff contends that the destruction of the property by order of the military commander representing the authority and power of the United States was such a taking of private property for public use as to imply a constitutional obligation, on the part of the Government, to make compensation to the owner. Const. Amend. V. In support of that view it refers to *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 656; *Great Falls Mfg. Co. v. Attorney General*, 124 U. S. 581, 597-8; *United States v. Lynah*, 188 U. S. 445. Let us examine those cases. . . .

It is clear that these cases lend no support to the proposition that an implied *contract* arose on the part of the United States to make compensation for the property destroyed by order of General Miles. The cases cited arose in a time of peace and in each it was claimed that there was within the meaning of the Constitution an actual taking of property for the use of the United States, and that the taking was by authority of Congress. That taking, it was adjudged, created by implication an obligation to make the compensation required by the Constitution. But can such a principle be enforced in respect of property de-

stroyed by the United States in the course of military operations for the purpose, and only for the purpose, of protecting the health and lives of its soldiers actually engaged at the time in war in the enemy's country? We say "enemy's country" because, under the recognized rules governing the conduct of a war between two nations, Cuba, being a part of Spain, was enemy's country, and all persons, whatever their nationality, who resided there were, pending such war, to be deemed enemies of the United States and of all its people. The plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted; indeed, subject under the laws of war to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy.

In *Miller v. United States*, 11 Wall. 268, 305, the court, speaking of the powers possessed by a nation at war, said: "It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is the right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality." In *Lamar's Ex'r v. Browne*, 92 U. S. 187, 194, the court said: "For the purposes of capture, property found in enemy territory is enemy property, without regard to the status of the owner. In war, all residents of enemy country are enemies." "All property within enemy territory," said the court in *Young v. United States*, 97 U. S. 39, 60, "is in law enemy property, just as all persons in the same territory are enemies. A neutral owning property within the enemy's lines holds it as enemy

property, subject to the laws of war; and if it be hostile property, subject to capture." Referring to the rules of war between independent nations as recognized on both sides in the late Civil War, the court, in *United States v. Pacific Railroad Co.*, 120 U. S. 227, 233, 239, said: "The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. . . . The inhabitants of the Confederate States on the one hand and of the States which adhered to the Union on the other became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended, and the courts of each were closed to the citizens of the other. *Brown v. Hiatts*, 14 Wall. 177, 184. . . . More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the Government. By the well-settled doctrines of public law it was not responsible for them. . . . The principle that, for injuries to or destruction of private property in necessary military operations, during the civil war, the Government is not responsible, is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been, as stated by the President in his veto message, 'a matter of bounty rather than of strict legal right.' " See also *The Venus*, 8 Cranch, 253, 278; *The Venice*, 2 Wall. 258, 275; *The Cheshire*, 3 Wall. 231, 233; *The Gray Jacket*, 5 Wall. 342, 345, 369; *The Friendschaft*, 4 Wheat. 105, 107; *Griswold v. Waddington*, 16 Johns. 438, 446-7; *Vattel*, b. 3, c. 5, Sec. 70, and c. 4, Sec. 8; *Burlamaqui*, Pt. 4, c. 4, Sec. 20.

So in *Hall's International Law*, 5th ed., 500, 504, 533: "A person though not a resident in a country may be so associated with it through having or being a partner in a house of trade as to be affected by its enemy character, in respect at least of the property which he possesses in the belligerent territory." In *Whiting's War Powers Under the Constitution*, 340, 342, the author says: "A foreigner may have his personal or permanent domicile in one country, and at the same time his constructive or mercantile domicile in another. The national character of

a merchant, so far as relates to his property engaged in trade, is determined by his commercial domicile. 'All such persons . . . are *de facto* subjects of the enemy sovereign, being residents within his territory, and are adhering to the enemy so long as they remain within his territory.' . . . A neutral, or a citizen of the United States, domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation."

In view of these principles—if there were no other reason—the plaintiff corporation could not invoke the protection of the Constitution in respect of its property used in business in Cuba, during the war, any more than a Spaniard residing there could have done, under like circumstances, in reference to his property then in that island. If the property destroyed by order of General Miles had belonged at the time to a resident Cuban, the owner would not have been heard in any court, under the facts found, to claim, as upon implied contract, compensation from the United States on account of such destruction. How then under the facts found could an obligation, based on implied contract, arise under the Constitution in favor of the plaintiff, an American corporation, which at the time and in reference to the property in question had a commercial domicile in the enemy's country? It is true that the army, under General Miles, was under a duty to observe the rules governing the conduct of independent nations when engaged in war—a duty for the proper performance of which the United States may have been responsible in its political capacity to the enemy government. If what was done was in conformity to those rules—as upon the facts found we must assume that it was—then the owner of the property has no claim of any kind for compensation or damages; for, in such a case the Commanding General has as much right to destroy the property in question if the health and safety of his troops required that to be done, as he would have had if at the time the property had been occupied and was being used by the armed troops of the enemy for hostile purposes. . . . The judgment of the Court of Claims must be affirmed.

It is so ordered.

NOTE.—Until well toward the end of the eighteenth century, enemy property on land was held to be subject to capture, and the pillaging of places occupied by a hostile force was one of the most brutal in-

cidents of warfare. The case of *Ware v. Hylton* (1796), 3 Dallas, 199, which involved the validity of a statute of Virginia confiscating debts due to British subjects, indicates the division of opinion which prevailed at that time. Justice Chase said:

Every nation at war with another is justifiable by the general and strict law of nations, to seize and confiscate all moveable property of its enemy, of any kind or nature whatsoever, wherever found, whether within its territory or not.

On the other hand, Justice Wilson expressed the view which was finally to prevail when he said:

By every nation, whatever is its form of government, the confiscation of debts has long been considered disreputable.

While the confiscation of private property on land is now generally reprobated, and is explicitly forbidden by the Hague Convention of 1907 on The Laws and Customs of War on Land, art. 46, the strictness of the rule varies with the kind of property involved. Even in the middle of the eighteenth century the attempt of Frederick the Great to sequester the interest due on a portion of his public debt owned by British subjects was strongly condemned. Frederick's act was regarded as particularly reprehensible because it seemed to involve his honor. On this controversy, known as the case of the Silesian Loan, see Moore, *Digest*, VII, 307; Calvo, IV, sec. 1917; Sir Ernest Satow, *The Silesian Loan and Frederick the Great*. As to the power to confiscate private debts see *Wolff v. Oxholm* (1817), 6 Maule & Selwyn, 92; *Hanger v. Abbott* (1868), 6 Wallace, 532; *Planters' Bank v. Union Bank* (1873), 16 Ib. 483; *Williams v. Bruffy* (1878), 96 U. S. 176; *Young v. United States* (1878), 97 U. S. 39. In 1861 and 1862 Congress passed two acts by which the confiscation of enemy private property which was being used in aid of the rebellion was authorized. As to their operation see *Conrad v. Waples* (1878), 96 U. S. 279; *Jenkins v. Collard* (1892), 145 U. S. 546; *United States v. Dunnington* (1892), 146 U. S. 338 and cases cited. Property which is of particular service in connection with the war is of course liable to seizure. In the American Civil War cotton was the chief reliance of the Confederacy for the purchase of supplies, and hence was deemed subject to capture, *Mrs. Alexander's Cotton* (1865), 2 Wallace, 404. In the case of *In re Ferdinand, Ex-Tsar of Bulgaria* (1920), L. R. [1921], 1 Ch. 107, the Court of Appeal carefully examined the prerogative of the Crown to confiscate enemy private property found in the kingdom, and decided that the right, subject to the provisions of the Trading with the Enemy Acts, still exists. Its exercise however was held to be inconsistent with those Acts. For further discussion see Moore, *Digest*, VII, 280; Borchard, sec. 103 *seq.* (where the subject is considered from the standpoint of the creation of a claim for remuneration); Cobbett, *Cases and Opinions*, II, 52; Bonfils (Fauchille), sec. 1056; Magoon, 264; Latifi, *Effects of War on Property*; Spaight, *War Rights on Land*.

In the Great War, the belligerent governments quite generally resorted to the practice of seizing and sequestering enemy private property found within their jurisdiction. See "Jurisdiction to Confiscate Debts," *Harvard Law Review*, XXXV, 960; Garner, I, ch. iv. For interpretations of American legislation, see *Central Union Trust Co. v. Garvan* (1921), 254 U. S. 554; *Stoehr v. Wallace* (1921), 255 U. S. 239.

Prior to the outbreak of the Great War, the ancient practice of detaining the ships of countries with which war had broken out or was thought to be impending seemed to be falling into disuse. At the outbreak of the Crimean War in 1854, Great Britain, France and Russia allowed enemy vessels in their ports six weeks in which to depart. See *The Phoenix* (1854), Spinks, *Prize Cases*, 1. A similar practice with a varying period of grace was followed by Prussia in 1866, by France and Prussia in 1870 and by Russia and Turkey in 1877. In the Spanish-American War the United States granted a delay of thirty days, which was liberally interpreted in *The Buena Ventura* (1899), 175 U. S. 384. The spirit if not the letter of the Sixth Convention of the Second Hague Conference was in harmony with the international practice of the preceding half-century. At the opening of the Great War Great Britain allowed enemy merchant ships of less than 6,000 tons ten days in which to load and depart. This was conditioned however upon reciprocity of treatment by Germany. Through a miscarriage of the communications between the two governments they failed to reach an understanding and consequently the British declaration did not become operative. See *The Chile* (1914), L. R. [1914] P. 212; *The Möwe* (1914), L. R. [1915] P. 1; *The Bellas* (Canada, 1914), 1 Br. & Col. P. C. 95. In the absence of any agreement to the contrary enemy ships in port at the outbreak of war are subject to seizure as prize, *The Marie Leonhardt* (1920), L. R. [1921] P. 1; but in accordance with art. 2 of Hague Convention No. VI, the value of a German vessel which had been detained by Great Britain at the outbreak of the war and requisitioned and which had been destroyed by a German vessel was awarded to the German claimant, *The Blonde* (1922), L. R. [1922] 1 A. C. 313. A vessel which remains in an enemy port because it had not been informed in unambiguous terms that it would be allowed to leave within a certain period is not subject to confiscation if it remains beyond that period, *The Turul* (1919), L. R. [1919] A. C. 515. The practice of the various belligerents at the beginning of the Great War is well summarized in Garner, I, Ch. vi.

In general a military force in occupation of a conquered country may seize for its own use any private property therein which it deems necessary or convenient, and the validity of such seizures cannot be questioned in the municipal tribunals of the district where they occur, *Elphinstone v. Bedreechund* (1817), 1 Knapp, P. C. 316; *Dow v. Johnson* (1879), 100 U. S. 158, 167. In the case of the destruction of private property on the ground of military necessity, the degree of the necessity does not present a justiciable question, *Ex parte Marais*, L. R. [1902] A. C. 109. See also *Mitchell v. Harmony* (1852), 13

Howard, 115; The Prize Cases (1863), 2 Black, 635; The William Bagaley (1867), 5 Wallace, 377; Miller v. United States (1871), 11 Ib. 268; United States v. Farragut (1875), 22 Ib. 406; Hijo v. United States (1904), 194 U. S. 315; Grant v. United States (1863), 1 Ct. Cl. 41; Wiggins v. United States (1868), 3 Ib. 412; Green v. United States (1875), 10 Ib. 466; Gooch v. United States (1880), 15 Ib. 281; Hefebower v. United States (1886), 21 Ib. 228; Brandon v. United States (1911), 46 Ib. 559. See also Borchard, sec 103; Cobbett, *Cases and Opinions*, II, 52; Hyde, II, 306; Moore, *Digest*, VI, 833.

The term *jus angariae* or right of angary is applied to the right of a state to seize, in the presence of an urgent necessity, the property of a friendly state or of its nationals which may be within its borders and to utilize or destroy such property subject always to the owner's right to full indemnification. On principle the right is applicable to the seizure of all kinds of property in both peace and war, but in practice the term is generally applied only to the seizure of vessels in time of war. By article 19 of Hague Convention No. 5, however, special provision is made for the seizure of railway materials and the exercise of the right was expressly extended to the property of neutrals.

The best known examples of the exercise of the right of angary are Napoleon's seizure in 1798 of many neutral vessels in French ports on the Mediterranean for use on his Egyptian Expedition; the seizure by the Prussians in 1870 of rolling stock of the Austrian and Swiss railways and of several British colliers which were sunk in the Seine; and the seizure by Great Britain and the United States of Dutch vessels in their ports in 1918. In all these cases, compensation was made or promised. While still at peace with Germany, Italy in 1915 requisitioned the German ships in her ports, and Portugal, while yet a neutral, requisitioned the German vessels which had long found refuge in her harbors. Some writers, notably Basdevant, have treated these seizures as extensions of the right of angary to neutrals. It would seem better however to recognize them merely as an exercise by Italy and Portugal of their territorial sovereignty, not dependent in any way upon the peculiar considerations upon which the right of angary has been supported. In much of the discussion of the right of angary, there is a confusion between the right of a belligerent to requisition property which has been captured and is in the custody of its prize court and its right to requisition neutral property which is within its jurisdiction through innocent and legitimate employment therein by the voluntary act of its owner. The two should be distinguished. In requisitioning property in the custody of its prize court the state is merely exercising in anticipation its right of ownership, for the claimant must assume the burden of satisfying the prize court that the capture of his property was unlawful, which in most cases he is unable to do. In the case of neutral property brought voluntarily within the belligerent's jurisdiction for an innocent purpose, the state seizes it because of its sovereign power over all persons and things within its territories. Fundamentally this is the principle upon the right of angary rests. When the Govern-

ment of the Netherlands, upon the seizure of the Dutch vessels in British ports in 1918, said that the seizure *en masse* of a neutral's merchant fleet could not be justified under an ancient usage which applied only to the taking of individual ships to meet an immediate necessity, the Earl of Balfour made this conclusive reply:

It is commonplace that the rights of a sovereign State extend over all property within its jurisdiction, irrespective of ownership, and neutral property within belligerent jurisdiction is, in the absence of special treaty stipulation, as liable to requisition in case of emergency as the property of subjects. . . . The fact that the exercise of this right has received a particular name should not obscure the truth that it is a legal exercise of the right of a sovereign State, and not an act by a belligerent based on no principle of law, and for which the only justification is to be found in usage.

British State Papers, Miscellaneous (1918), No. 5.

The most comprehensive treatment of the right of angary is found in A. E. Albrecht, "Requisitionen von neutralem Privateigentum, insbesondere von Schiffen," in *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, VI, supplement I. See also J. Basdevant, "La requisition des navires allemands en Portugal," in *Revue Generale de Droit International Public*, XXIII, 268; Spaight, *War Rights on Land*; Kleen, *Lois et Usages de la Neutralité*; Phillimore, *Commentaries upon International Law*; Hall, *International Law* (7th ed.), 812; J. Eugene Harley, "The Law of Angary," *Am. Jour. Int. Law*, XIII, 267; Allin, "The Right of Angary," *Minnesota Law Review*, II, 415; Hyde, II, 261.

SECTION 2. THE RIGHT OF VISIT, SEARCH AND CAPTURE ON THE HIGH SEAS.

A DUTCHMAN AGAINST LINDSAY.

COURT OF SESSION OF SCOTLAND. 1558.
Morison, Decisions of the Court of Session, 11857.

Anent the action pursued [brought] by a Dutchman against Lindsay, dwelling in Leith, for restoring of a ship to the said Dutchman, alleged to be spuizied [taken] from him by certain pirates on the sea, and found and apprehended in the possession of the said Lindsay, in the haven of Leith, and desired by the said Dutchman to be restored to him again, it was alleged by the said Lindsay, that he ought not to restore the said ship to the said Dutchman, because he bona fide coft [bought] the said

ship from a French man of war, who took the said ship from an Hollander, who was bringing victuals to the town of Berwick, in time of war, to furnish our old enemies of England, and also *prehabatur inter reges Gallorum*, and the Hollanders, and Flemings, and English, and so was just prize to the said Frenchman that sold her to the said Lindsay, which allegiance [allegation] was admitted to the said Lindsay's probation.

THE MARIA.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1799.

1 C. Robinson, 340.

This was the leading case of a fleet of Swedish merchantmen, carrying pitch, tar, hemp, deals, and iron to several ports of France, Portugal, and the Mediterranean; and taken, Jan. 1798, sailing under convoy of a ship of war, and proceeded against for resistance of visitation and search by British cruisers. . . .

Sir W. SCOTT [LORD STOWELL]: . . . I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me;—namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality.—It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm;—to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. . . . [Here follows an examination of the facts of the capture and the instructions to the Swedish cruisers.]

Removing mere civility of expression, what is the real import of these instructions? Neither more nor less than this, accord-

ing to my apprehension:—"If you meet with the cruisers of the belligerent states, and they express an intention of visiting and searching the merchant-ships, you are to *talk* them out of their purpose if you can; and if you can't, you are to *fight* them out of it." That is the plain English, and, I presume, the plain Swedish, of the matter. . . .

This being the actual state of facts, it is proper for me to examine, 2dly, what is their legal state, or, in other words, to what considerations they are justly subject, according to the law of nations; for which purpose I state a few principles of that system of law which I take to be incontrovertible.

1st, That the right of visiting and searching merchant-ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that *free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit that wherever force is used, it may be forcibly resisted; a lawful force cannot lawfully be re-

sisted. The only case where it can be so in matters of this nature, is in the state of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly coexist.

2dly, That the authority of the Sovereign of the neutral country being interposed in any manner of mere force cannot *legally* vary the rights of a lawfully-commissioned belligerent cruiser; I say *legally*, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter which, sitting in this Court, I have no right to entertain. All that I assert is, that *legally* it cannot be maintained, that if a Swedish commissioned cruiser, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the King of England, being neutral to Sweden, is authorized by that law to obstruct the exercise of that right with respect to the merchant-ships of his country. I add this, that I cannot but think that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right. Two sovereigns may unquestionably agree, if they think fit, (as in some late instances they have agreed,) by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it. I am not ignorant, that amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorized speculations it is not necessary for me to descant: the law and practice of nations (I include particularly the practice of Sweden when it happens

to be belligerent) give them no sort of countenance; and until that law and practice are new-modelled in such a way as may surrender the known and ancient rights of some nations to the present convenience of other nations, (which nations may perhaps REMEMBER to *forget* them, when they happen to be themselves belligerent), no reverence is due to them; they are the elements of that system which, if it is consistent, has for its purpose an entire abolition of capture in war—that is, in other words, to change the nature of hostility, as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed among civilized states, and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expence of the constant hazard of the harmony of states, and of the lives and safeties of innocent individuals.

3dly, That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. For the proof of this I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public law. In Book III. c. vii., sect. 114, he expresses himself thus: “*On ne peut empêcher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres que l'on rencontre en mer. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents tems de se soumettre à cette visite, aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se seroit condamner par cela seul, comme étant de bonne prise.*” Vattel is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact that such is the existing practice of modern Europe. And to be sure the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle, not only of the civil law, (on which great part of the law of nations is founded,) but of the private jurisprudence of most countries in Europe,—that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. . . . I venture to lay it down that by the law of nations, as now understood, a

deliberate and continued resistance to search, on the part of a neutral vessel to a lawful cruiser, is followed by the legal consequence of confiscation. . . .

THE SALLY.

THE LORDS COMMISSIONERS OF APPEALS OF ENGLAND. 1795.

3 C. Robinson, 300, *note*.

The Sally, Griffiths, was a case of a cargo of corn shipped March 1793 by Steward and Plunket of Baltimore, ostensibly for the account and risk of Conyngham, Nesbit, and Co. of Philadelphia, and consigned to them *or their assigns*:—By an endorsement on the bill of lading, it was further agreed that the ship should proceed to Havre de Grace, and there wait such time as might be necessary, the orders of the consignee of the said cargo (the mayor of Havre), either to deliver the same at the port of Havre, or proceed therewith to any one port without the Mediterranean. . . .

Amongst the papers was a concealed letter from Jean Ternant, the minister of the French Republic to the United States, in which he informs the minister of foreign affairs in France, “The house of Conyngham and Co. already known to the ministers, by their former operations for France, is charged by me to procure without delay, a consignment of 22,000 bushels of wheat, 8,000 barrels of fine flour, 900 barrels of salted beef from New England. The conditions stipulated are the same as those of the contract of 2d November 1792 with the American citizens Swan and Co. . . . It has been moreover agreed, considering the actual reports of war, that the whole shall be sent as American property to Havre and to Nantes, with power to our government of sending the ships to other ports conditional on the usual freight. As you have not signified to me to whom these cargoes ought to be delivered in our ports, I shall provide each captain with a letter to the mayor of the place.”

There was also a letter from J. Ternant to the mayor of the municipality of Havre. “Our government having ordered me to send supplies of provisions to your port, I inform you that the bearer of this, commanding the American ship the Sally,

is laden with a cargo of wheat, of which he will deliver you the bill of lading."

To the 12th and 20th interrogatories the master deposed, "that he believes the flour was the property of the French government, and, on being unladen, would have immediately become the property of the French government." . . .

THE COURT [present the Earl of Mansfield, Sir R. P. Arden, M. R., and Sir W. Wynne] said: It has always been the rule of the prize Courts, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemies' property. When the contract is made in time of peace or without any contemplation of a war, no such rule exists:—But in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. The bill of lading expresses account and risk of the American merchants; but papers alone make no proof, unless supported by the depositions of the master. Instead of supporting the contents of his papers, the master deposes, "that on arrival the goods would become the property of the French government," and all the concealed papers strongly support him in this testimony: The *evidentia rei* is too strong to admit farther proof. Supposing that it was to become the property of the enemy on delivery, *capture* is considered as *delivery*: The captors, by the rights of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's property. On every principle on which Prize Courts can proceed, this cargo must be considered as enemy's property.

Condemned.

THE PACKET DE BILBOA.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1799.
2 C. Robinson, 133.

This was a case of a claim of an English house, for goods shipped on board a Spanish vessel, by the order of Spanish mer-

chants, before hostilities with Spain, and captured December 1796, on a voyage from London to Corunna. . . .

Sir W. SCOTT [LORD STOWELL]. This is a claim of a peculiar nature for goods sent by British subjects to Spain, shipped before hostilities, during the time of that situation of the two countries, of which it was unknown, even to our government, what would be the issue, between them. There appears to be no ground to say, that this contract was influenced by speculations on the prospect of a war, or that anything has been specially done to avoid the risks of war. It is sworn in the affidavit of the claimant, "That this is the constant habit and practice of this trade;" whether it is the practice of the Spanish trade generally, or only the particular mode of these individuals in carrying on commerce together is not material, as the latter would be quite sufficient to raise the subject of this claim. The question is, In whom is the legal title? Because, if I should find that the interest was in the Spanish consignee, I must then condemn, and leave the British party to apply to the Crown for that grace and favor which it is always ready to shew; the property being condemnable to the Crówn as taken before hostilities.

The statement of the claim sets forth, that these goods have not been paid for by the Spaniard;—that would go but little way,—that alone would not do; there must be many cases in which British merchants suffer from capture, by our own cruizers, of goods shipped for foreign account before the breaking out of hostilities. It goes on to state, "That, according to the custom of the trade, a credit of six, nine, or twelve months is usually given, and that it is not the custom to draw on the consignee till the arrival of the goods; that the sea risk in peace as well as war is on the consignor, that he insures, and has no remedy against the consignee for any accident that happens during the voyage." Under these circumstances, in whom does the property reside? The ordinary state of commerce is, that goods ordered and delivered to the master are considered as delivered to the consignee, whose agent the master is in this respect; but that general contract of the law may be varied by special agreement, or by a particular prevailing practice, that presupposes an agreement amongst such a description of merchants. In time of profound peace when there is no prospect of approaching war, there would unquestionably be nothing illegal in contracting, that the whole risk should fall on the con-

signor, till the goods came into possession of the consignee. In time of peace they may divide their risk as they please, and nobody has a right to say they shall not; it would not be at all illegal, that goods not shipped in time of war, or in contemplation of war, should be at the risk of the shipper. In time of war this cannot be permitted, for it would at once put an end to all captures at sea; the risk would in all cases be laid on the consignor, where it suited the purpose of protection; on every contemplation of a war, this contrivance would be practised in all consignments from neutral ports to the enemy's country, to the manifest defrauding of all rights of capture; it is therefore considered to be an invalid contract in time of war; or, to express it more accurately, it is a contract which, if made in war, has this effect; that the captor has a right to seize it and convert the property to his own use; for he having all the rights that belong to his enemy, is authorised to have his taking possession considered as equivalent to an actual delivery to his enemy; and the shipper who put it on board during a time of war, must be presumed to know the rule, and to secure himself in his agreement with the consignee, against the contingency of any loss to himself that can arise from capture. In other words, he is a mere insurer against sea risk, and he has nothing to do with the case of capture, the loss of which falls entirely on the consignee. If the consignee refuses payment, and throws it upon the shipper, the shipper must be supposed to have guarded his own interests against that hazard, or he has acted improvidently and without caution.

The present contract is not of this sort; it stands as a lawful agreement, being made whilst there was neither war nor prospect of war. The goods are sent at the risk of the shipper: If they had been lost, on whom would the loss have fallen but on him? What surer test of property can there be than this? It is the true criterion of property, that, if you are the person on whom the loss will fall, you are to be considered as the proprietor. The bill of lading very much favors this account. The master binds himself to the shipper, "to deliver for you and in your name," by which it is to be understood that the delivery had not been made to the master for the consignee, but that he was to make the delivery in the name of the shipper to the consignee, till which time the inference is, that they were to remain the property of the shipper: as to the payment of freight, that is not material, as in the end the purchaser must necessarily pay

the carriage:—The other consideration, Who bears the loss? much outweighs that,—neither does the case put shew the contrary. The case put is—supposing Spain and England both neutral, and that these goods had been taken by the French and sold to great profit, to whose advantage would it have been? The answer is, If the goods were to continue the property of the shipper till delivery, it must have enured to *his* benefit, and not that of the consignee. To make the loss fall upon the shipper in the case of the present shipment, would be harsh in the extreme. He ships his goods in the ordinary course of traffic, by an agreement mutually understood between the parties, and in no wise injurious to the rights of any third party; an event subsequently happens which he could in no degree provide against. If he is to be the sufferer, he is a sufferer without notice, and without the means of securing himself; he was not called upon to know that the injustice of the other party would produce a war before the delivery of his goods: The consignee may refuse payment, referring to the terms of the contract which was made when it was perfectly lawful; and under what circumstances and on what principles the shipper could ever enforce payment against the consignee is not easy to discover. The goods have never been delivered in Spain; they were to have been at the risk of the shipper till delivery, and this under a perfectly fair contract. I must consider the property to reside still in the English merchant; it is a case altogether different from other cases which have happened on this subject *flagrante bello*. I am of opinion that, on all just considerations of ownership, the legal property is in the British merchant, that the loss must have fallen on the shipper, and the delivery was not to have been made till the last stage of the business, till they had actually arrived in Spain, and had been put into the hands of the consignee; and therefore I shall decree restitution of the goods to the shipper.

On prayer that the captor's expences might be paid, it was answered that they had already had the benefit of the condemnation of the ship.

Court.—I think there has been a great service performed to the shipper. If the goods had not been captured, they would have gone into the possession of the enemy. The captor did right in bringing the question before the Court, and he ought by no means to be a loser.—I shall not give a salvage, but shall direct the expences of the captor to be paid out of the proceeds.

THE NEREIDE.

SUPREME COURT OF THE UNITED STATES. 1815.
9 Cranch, 388.

Appeal from the Circuit Court of the United States for the district of New York.

[The ship Nereide, the property of a British subject, was chartered in London August 26, 1813, by Manuel Pinto, a Spanish citizen residing in Buenos Ayres, for a voyage from London to Buenos Ayres and return. The ship was loaded with a cargo belonging in part to British and in part to Spanish subjects. On her outward voyage, while in the vicinity of Madeira, the ship was captured by an American privateer, and brought into the port of New York, where the vessel and cargo were libelled and condemned. Pinto, on behalf of himself and other Spanish subjects, appealed from that part of the decision which applied to so much of the cargo as was their property.]

MARSHALL, CH. J., . . . delivered the opinion of the court. . . .

2. Does the treaty between Spain and the United States subject the goods of either party, being neutral, to condemnation as enemy property, if found by the other in the vessel of an enemy? That treaty stipulates that neutral bottoms shall make neutral goods, but contains no stipulation that enemy bottoms shall communicate the hostile character to the cargo. It is contended by the captors that the two principles are so completely identified that the stipulation of the one necessarily includes the other.

Let this proposition be examined.

The rule that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly it has been fully and unequivocally recognized by the United States. This rule is founded on the simple and intelligible principle that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend. In the practical application of this principle, so as to form the rule, the propositions that the

neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vehicle in which it is found.

Many nations have believed it to be their interest to vary this simple and natural principle of public law. They have changed it by convention between themselves as far as they have believed it to be for their advantage to change it. But unless there be something in the nature of the rule which renders its parts unsusceptible of division, nations must be capable of dividing it by express compact, and if they stipulate either that the neutral flag shall cover enemy goods, or that the enemy flag shall infect friendly goods, there would, in reason, seem to be no necessity for implying a distinct stipulation not expressed by the parties. Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion. Neither the one nor the other is to be ascribed to inattention. And if an omitted article be not necessarily implied in one which is inserted, the subject to which that article would apply remains under the ancient rule. That the stipulation of immunity to enemy goods in the bottoms of one of the parties being neutral does not imply a surrender of the goods of that party being neutral, if found in the vessel of an enemy, is the proposition of the counsel for the claimant, and he powerfully sustains that proposition by arguments arising from the nature of the two stipulations. The agreement that neutral bottoms shall make neutral goods is, he very justly remarks, a concession made by the belligerent to the neutral. It enlarges the sphere of neutral commerce, and gives to the neutral flag a capacity not given to it by the law of nations.

The stipulation which subjects neutral property, found in the bottom of an enemy, to condemnation as prize of war, is a concession made by the neutral to the belligerent. It narrows the sphere of neutral commerce, and takes from the neutral a privilege he possessed under the law of nations. The one may be, and often is, exchanged for the other. But it may be the interest and the will of both parties to stipulate the one without the other; and if it be their interest, or their will, what shall prevent

its accomplishment? A neutral may give some other compensation for the privilege of transporting enemy goods in safety, or both parties may find an interest in stipulating for this privilege, and neither may be disposed to make to, or require from, the other the surrender of any right as its consideration. What shall restrain independent nations from making such a compact? And how is their intention to be communicated to each other or to the world so properly as by the compact itself?

If reason can furnish no evidence of the indissolubility of the two maxims, the supporters of that proposition will certainly derive no aid from the history of their progress from the first attempts at their introduction to the present moment.

For a considerable length of time they were the companions of each other—not as one maxim consisting of a single indivisible principle, but as two stipulations, the one, in the view of the parties, forming a natural and obvious consideration for the other. The celebrated compact termed the armed neutrality attempted to effect by force a great revolution in the law of nations. The attempt failed, but it made a deep and lasting impression on public sentiment. The character of this effort has been accurately stated by the counsel for the Claimants. Its object was to enlarge, and not in any thing to diminish the rights of neutrals. The great powers, parties to this agreement, contended for the principle, that free ships should make free goods; but not for the converse maxim; so far were they from supposing the one to follow as a corollary from the other, that the contrary opinion was openly and distinctly avowed. The king of Prussia declared his expectation that in future neutral bottoms would protect the goods of an enemy, and that neutral goods would be safe in an enemy bottom. There is no reason to believe that this opinion was not common to those powers who acceded to the principles of the armed neutrality.

From that epoch to the present, in the various treaties which have been formed, some contain no article on the subject and consequently leave the ancient rule in full force. Some stipulate that the character of the cargo shall depend upon the flag, some that the neutral flag shall protect the goods of an enemy, some that the goods of a neutral in the vessel of a friend shall be prize of war, and some that the goods of an enemy in a neutral bottom shall be safe, and that friendly goods in the bottom of an enemy shall also be safe.

This review which was taken with minute accuracy at the bar,

certainly demonstrates that in public opinion no two principles are more distinct and independent of each other than the two which have been contended to be inseparable.

Do the United States understand this subject differently from other nations? It is certainly not from our treaties that this opinion can be sustained. The United States have in some treaties stipulated for both principles, in some for one of them only, in some that neutral bottoms shall make neutral goods and that friendly goods shall be safe in the bottom of an enemy. It is therefore clearly understood in the United States, so far as an opinion can be formed on their treaties, that the one principle is totally independent of the other. They have stipulated expressly for their separation, and they have sometimes stipulated for the one without the other.

But in a correspondence between the secretary of state of the United States and the minister of the French republic in 1793, Prussia is enumerated among those nations with whom the United States had made a treaty adopting the entire principle that the character of the cargo shall be determined by the character of the flag.

Not being in possession of this correspondence the Court is unable to examine the construction it has received. It has not deferred this opinion on that account, because the point in controversy at that time was the obligation imposed on the United States to protect belligerent property in their vessels, not the liability of their property to capture if found in the vessel of a belligerent. To this point the whole attention of the writer was directed, and it is not wonderful that in mentioning incidentally the treaty with Prussia which contains the principle that free bottoms made free goods, it should have escaped his recollection that it did not contain the converse of the maxim. On the talents and virtues which adorned the cabinet of that day, on the patient fortitude with which it resisted the intemperate violence with which it was assailed, on the firmness with which it maintained those principles which its sense of duty prescribed, on the wisdom of the rules it adopted, no panegyric has been pronounced at the bar in which the best judgment of this Court does not concur. But this respectful deference may well comport with the opinion, that an argument incidentally brought forward by way of illustration, is not such full authority as a decision directly on the point might have been.

3. The third point made by the captors is, that whatever

construction might be put on our treaty with Spain, considered as an independent measure, the ordinances of that government would subject American property, under similar circumstances, to confiscation, and therefore the property, claimed by Spanish subjects in this case, ought to be condemned as prize of war.

The ordinances themselves have not been produced, nor has the Court received such information respecting them as would enable it to decide certainly either on their permanent existence, or on their application to the United States. But be this as it may, the Court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political not a legal measure. It is for the consideration of the government not of its Courts. . . . If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.

Thus far the opinion of the Court has been formed without much difficulty. Although the principles, asserted by the counsel, have been sustained on both sides with great strength of argument, they have been found on examination to be simple and clear in themselves. Stripped of the imposing garb in which they have been presented to the Court, they have no intrinsic intricacy which should perplex the understanding.

The remaining point is of a different character. Belligerent rights and neutral privileges are set in array against each other. Their respective pretensions, if not actually intermixed, come into close contact, and the line of partition is not so distinctly marked as to be clearly discernible. It is impossible to declare in favor of either, without hearing, from the other, objections which it is difficult to answer and arguments, which it is not easy to refute. The Court has given to this subject a patient investigation, and has endeavored to avail itself of all the aid which has been furnished by the bar. The result, if not completely satisfactory even to ourselves, is one from which it is believed we should not depart were further time allowed for deliberation.

4. Has the conduct of Manuel Pinto and of the Nereide been such as to impress the hostile character on that part of the cargo which was in fact neutral?

In considering this question the Court has examined separately the parts which compose it.

The vessel was armed, was the property of an enemy, and made resistance. How do these facts affect the claim?

Had the vessel been armed by Pinto, that fact would certainly have constituted an important feature in the case. But the Court can perceive no reason for believing she was armed by him. He chartered, it is true, the whole vessel, and that he might as rightfully do as contract for her partially; but there is no reason to believe that he was instrumental in arming her. . . .

Whether the resistance, which was actually made, is in any degree imputable to Mr. Pinto, is a question of still more importance.

It has been argued that he had the whole ship, and that, therefore, the resistance was his resistance. . . . His control over the ship began and ended with putting the cargo on board. He does not appear ever to have exercised any authority in the management of the ship. So far from exercising any during the battle, he went into the cabin where he remained till the conflict was over. . . .

The next point to be considered is the right of a neutral to place his goods on board an armed belligerent merchantman.

That a neutral may lawfully put his goods on board a belligerent ship for conveyance on the ocean, is universally recognized as the original rule of the law of nations. It is, as has already been stated, founded on the plain and simple principle that the property of a friend remains his property wherever it may be found. "Since it is not," says Vattel, "the place where a thing is which determines the nature of that thing, but the character of the person to whom it belongs, things belonging to neutral persons which happen to be in an enemy's country, or on board an enemy's ships, are to be distinguished from those which belong to the enemy."

Bynkershoek lays down the same principles in terms equally explicit; and in terms entitled to the more consideration, because he enters into the enquiry whether a knowledge of the hostile character of the vessel can affect the owner of the goods.

The same principle is laid down by other writers on the same subject, and is believed to be contradicted by none. It is true there were some old ordinances of France declaring that a hostile vessel or cargo should expose both to condemnation. But these ordinances have never constituted a rule of public law.

It is deemed of much importance that the rule is universally laid down in terms which comprehend an armed as well as an unarmed vessel; and that armed vessels have never been excepted from it. Bynkershoek, in discussing a question suggesting an exception, with his mind directed to hostilities, does not hint that this privilege is confined to unarmed merchantmen.

In point of fact, it is believed that a belligerent merchant vessel rarely sails unarmed, so that this exception from the rule would be greater than the rule itself. At all events, the number of those who are armed and who sail under convoy, is too great not to have attracted the attention of writers on public law; and this exception to their broad general rule, if it existed, would certainly be found in some of their works. It would be strange if a rule laid down, with a view to war, in such broad terms as to have universal application, should be so construed as to exclude from its operation almost every case for which it purports to provide, and yet that not a *dictum* should be found in the books pointing to such construction.

The antiquity of the rule is certainly not unworthy of consideration. It is to be traced back to the time when almost every merchantman was in a condition of self-defence, and the implements of war were so light and so cheap that scarcely any would sail without them.

A belligerent has a perfect right to arm in his own defence; and a neutral has a perfect right to transport his goods in a belligerent vessel. These rights do not interfere with each other. The neutral has no control over the belligerent right to arm—ought he to be accountable for the exercise of it?

By placing neutral property in a belligerent ship, that property, according to the positive rules of law, does not cease to be neutral. Why should it be changed by the exercise of a belligerent right, universally acknowledged and in common use when the rule was laid down, and over which the neutral had no control?

The belligerent answers, that by arming his rights are impaired. By placing his goods under the guns of an enemy, the neutral has taken part with the enemy and assumed the hostile character.

Previous to that examination which the Court has been able to make of the reasoning by which this proposition is sustained, one remark will be made which applies to a great part of it. The argument which, taken in its fair sense, would prove that it is

unlawful to deposit goods for transportation in the vessel of an enemy generally, however imposing its form, must be unsound, because it is in contradiction to acknowledged law.

It is said that by depositing goods on board an armed belligerent the right of search may be impaired, perhaps defeated.

What is this right of search? Is it a substantive and independent right wantonly, and in the pride of power, to vex and harass neutral commerce, because there is a capacity to do so? or to indulge the idle and mischievous curiosity of looking into neutral trade? or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port before the sailing of the vessel, or that belligerent licenses should be procured. But this is not its character.

Belligerents have a full and perfect right to capture enemy goods and articles going to their enemy which are contraband of war. To the exercise of that right the right of search is essential. It is a mean justified by the end. It has been truly denominated a right growing out of, and ancillary to the greater right of capture. Where this greater right may be legally exercised without search, the right of search can never arise or come into question.

But it is said that the exercise of this right may be prevented by the inability of the party claiming it to capture the belligerent carrier of neutral property.

And what injury results from this circumstance? If the property be neutral, what mischief is done by its escaping a search? In so doing there is no sin even as against the belligerent, if it can be effected by lawful means. The neutral cannot justify the use of force or fraud, but if by means, lawful in themselves, he can escape this vexatious procedure, he may certainly employ them.

To the argument that by placing his goods in the vessel of an armed enemy, he connects himself with that enemy and assumes the hostile character; it is answered that no such connexion exists.

The object of the neutral is the transportation of his goods. His connexion with the vessel which transports them is the same, whether that vessel be armed or unarmed. The act of arming is not his—it is the act of a party who has a right to do so. He meddles not with the armament nor with the war. Whether his goods were on board or not, the vessel would be armed and

would sail. His goods do not contribute to the armament further than the freight he pays, and freight he would pay were the vessel unarmed.

It is difficult to perceive in this argument anything which does not also apply to an unarmed vessel. In both instances it is the right and the duty of the carrier to avoid capture and to prevent a search. There is no difference except in the degree of capacity to carry this duty into effect. The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel without imparting to his goods the belligerent character.

The argument respecting resistance stands on the same ground with that which respects arming. Both are lawful. Neither of them is chargeable to the goods or their owner, where he has taken no part in it. They are incidents to the character of the vessel; and may always occur where the carrier is belligerent.

It is remarkable that no express authority on either side of this question can be found in the books. A few scanty materials, made up of inferences from cases depending on other principles, have been gleaned from the books and employed by both parties. They are certainly not decisive for or against either.

The celebrated case of the Swedish convoy [*The Maria* (1799), 1 C. Robinson, 340] has been pressed into the service. But that case decided no more than this, that a neutral may arm, but cannot by force resist a search. The reasoning of the judge on that occasion would seem to indicate that the resistance condemned the cargo, because it was unlawful. It has been inferred on the one side that the goods would be infected by the resistance of the ship, and on the other that a resistance which is lawful, and is not produced by the goods, will not change their character.

The case of the *Catherine Elizabeth* approaches more nearly to that of the *Nereide*, because in that case as in this there were neutral goods and a belligerent ship. It was certainly a case, not of resistance, but of an attempt by a part of the crew to seize the capturing vessel. Between such an attempt and an attempt to take the same vessel previous to capture, there does not seem to be a total dissimilitude. But it is the reasoning of the judge and not his decision, of which the Claimants would avail themselves. He distinguishes between the effect which the employment of force by a belligerent owner or by a neutral owner would have on neutral goods. The first is lawful, the last unlawful. The belligerent owner violates no duty. He is held

by force and may escape if he can. From the marginal note it appears that the reporter understood this case to decide in principle that resistance by a belligerent vessel would not confiscate the cargo. It is only in a case without express authority that such materials can be relied on.'

If the neutral character of the goods is forfeited by the resistance of the belligerent vessel, why is not the neutral character of the passengers forfeited by the same cause? The master and crew are prisoners of war, why are not those passengers who did not engage in the conflict also prisoners? That they are not would seem to the Court to afford a strong argument in favor of the goods. The law would operate in the same manner on both.

It cannot escape observation, that in argument the neutral freighter has been continually represented as arming the Nereide and impelling her to hostility. He is represented as drawing forth and guiding her warlike energies. The Court does not so understand the case. The Nereide was armed, governed, and conducted by belligerents. With her force, or her conduct, the neutral shippers had no concern. They deposited their goods on board the vessel, and stipulated for their direct transportation to Buenos Ayres. It is true that on her passage she had a right to defend herself, and might have captured an assailing vessel; but to search for the enemy would have been a violation of the charter party and of her duty.

With a pencil dipped in the most vivid colors, and guided by the hand of a master, a splendid portrait has been drawn exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials, of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought always to belong to those who sit on this bench, to discover its only imperfection; its want of resemblance.

The Nereide has not that centaur-like appearance which has been ascribed to her. She does not rove over the ocean hurling the thunders of war while sheltered by the olive branch of peace. She is not composed in part of the neutral character of Mr. Pinto, and in part of the hostile character of her owner. She is an open and declared belligerent; claiming all the rights, and subject to all the dangers of the belligerent character. She conveys neutral property which does not engage in her warlike

equipments, or in any employment she may make of them; which is put on board solely for the purpose of transportation, and which encounters the hazard incident to its situation; the hazard of being taken into port, and obliged to seek another conveyance should its carrier be captured.

In this it is the opinion of the majority of the Court there is nothing unlawful. The characters of the vessel and cargo remain as distinct in this as in any other case. The sentence, therefore, of the Circuit Court must be reversed, and the property claimed by Manuel Pinto for himself and his partners, and for those other Spaniards for whom he has claimed, be restored, and the libel as to that property, be dismissed.

[MR. JUSTICE JOHNSON delivered a concurring opinion, and MR. JUSTICE STORY, for himself and one other, delivered a dissenting opinion.]

THE MIRAMICHI.

ADMIRALTY DIVISION (IN PRIZE) OF THE HIGH COURT OF JUSTICE OF ENGLAND. 1914.

Law Reports [1915] P. 71.

[In June, 1914, an American firm contracted to sell 16,000 bushels of wheat to certain firms in Germany. The wheat was loaded upon the British ship *Miramichi* at Galveston, Texas, in July, 1914. The whole transaction was in entire innocence of any anticipation of war. The shippers obtained the bill of lading and drew a bill of exchange upon the buyers which was discounted by the Guaranty Trust Co. of New York, to whom the sellers delivered the bill of lading, which was to be delivered to the buyer on payment of the bill of exchange. En route to Rotterdam, the owners of the vessel ordered her to put into a British port because of the outbreak of war. While in a British port the cargo was seized as prize. The bill of exchange was presented to the buyers, who refused to accept it or to pay the sum due. The sellers and the Guaranty Trust Co. appear as claimants and base their argument on the ground that the cargo is neutral property.]

SIR SAMUEL EVANS, PRESIDENT. . . . The question of law

. . . is, was the cargo on September 1 subject to seizure or capture by or on behalf of the Crown, as droits of admiralty or as prize?

Before this question is dealt with, I desire to point out, and to emphasize, that nothing which I shall say in this case is applicable to capture or seizure at sea or in port of any property dealt with during the war, or in anticipation of the war. Questions relating to such property are on an entirely different footing from those relating to transactions initiated during the happier times of peace. The former are determined largely or mainly upon considerations of the rights of belligerents and of attempts to defeat such rights. . . .

In the case now before the Court there is no place for any idea of an attempt to defeat the rights of this country as a belligerent; and the case has to be determined in accordance with the principles by which rights of property are ascertained by our law in time of peace. . . .

Very difficult questions often arise at law as to when the property in goods carried by sea is transferred, or vests; and at whose risk goods are at a particular time, or who suffers by their loss. These are the kind of questions which are often brushed aside in the Prize Court when the transactions in which they are involved take place during war or were embarked in when war was imminent or anticipated. But where, as in the present case, all the material parts of the business transaction took place *bona fide* during peace, and it becomes necessary to decide questions of property, I hold that the law to be applied is the ordinary municipal law governing contracts for the sale and purchase of goods.

Where goods are contracted for to be sold and are shipped during peace without any anticipation of imminent war, and are seized or captured afloat after war has supervened, the cardinal principle is, in my opinion, that they are not subject to seizure or capture unless under the contract the property in the goods has by that time passed to the enemy. It may be that the element of risk may legitimately enter into the consideration of the question whether the property has passed or has become transferred. But the incidence of risk or loss is not by any means the determining factor of property or ownership. . . . The main determining factor is whether, according to the intention of seller and buyer, the property had passed.

The question which governs this case, therefore, is, whose

property were the goods at the time of seizure? . . .

In my opinion, the result of the many decisions . . . is that, in the circumstances of the present case, the goods had not, at the time of seizure, passed to the buyers; but that the sellers had reserved a right of disposal or a *jus disponendi* over them, and that the goods still remained their property, and would so remain until the shipping documents had been tendered to and taken over by the buyer, and the bill of exchange for the price had been paid.

It follows that the goods seized were the property of the American claimants, and were not subject to seizure; the Court decrees accordingly, and orders the goods to be released to the claimants. . . .

THE ROUMANIAN.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1915.
Law Reports [1916] 1 A. C. 124.

Appeal from a decision of the Prize Court (England), December 7, 1914; reported [1915] P. 26. . . .

[At the outbreak of war between Great Britain and Germany, the Roumanian, a British ship, was on the way from Port Arthur, Texas, to Hamburg with a cargo of oil belonging to a German company. On reaching the English Channel the vessel was diverted by her owners to a British port where the oil was discharged into tanks on shore. When the larger part of it had been discharged, the whole of it was seized as prize, and the seizure was sustained as lawful by Sir Samuel Evans. The claimants appealed.]

LORD PARKER OF WADDINGTON. . . . Three points were raised by counsel for the appellants. They contended, first, that, so far as the petroleum was not afloat at the date of seizure, the Prize Court had no jurisdiction; secondly, that even if the Prize Court had jurisdiction, it ought not to have condemned the petroleum so far as at the date of seizure it was warehoused in the tanks of the British Petroleum Company, Limited, and no longer on board the Roumanian; and, thirdly, that enemy goods

on British ships at the commencement of hostilities either never were, or, at any rate, have long ceased to be, liable to seizure at all. Obviously, if the last point is correct, it is unnecessary to decide the first two points. Their Lordships, therefore, think it desirable to deal with it at once.

The contention that enemy goods on British ships at the commencement of hostilities are not the subject of maritime prize was not argued before the President in the present case. It had already been decided by him in *The Miramichi*, [1915] P. 71. Their Lordships have carefully considered the judgment of the President in the last-mentioned case, and entirely agree with it. The appellants' counsel based their contention on three arguments. First, they relied on the dearth of reported cases in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, emphasizing the fact that in the case of *The Juno*, 112 L. T. 471, no authority could be found for the right of the master of a British ship on which enemy goods were seized as prize to compensation in lieu of freight, though if such goods were properly the subject of prize the question must constantly have arisen. Secondly, they laid stress on certain general statements contained in text-books on international law as to what enemy goods can now be seized as prize. Thirdly, they called in aid that part of the Declaration of Paris which affords protection to enemy goods other than contraband on neutral ships and the principle underlying or supposed to underlie such Declaration.

With regard to the dearth of reported decisions, it is to be observed that the plainer a proposition of law, the more difficult it sometimes is to find a decision actually in point. Counsel are not in the habit of advancing arguments which they think untenable, nor as a general rule do cases in which no point of law is raised and decided find their way into law reports. If, on the one hand, it be difficult to find a case in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, it is, on the other hand, quite certain that no case can be found in which such goods have been held immune from seizure. Further, inasmuch as by international comity British Prize Courts have in general extended to neutrals the privileges enjoyed by British subjects, we should, if this contention be correct, expect to find that enemy goods on neutral ships at the commencement of hostilities were alike immune from seizure. Their Lordships have been unable to find any au-

thority which gives colour to this suggestion. There appears, indeed, to be no case in which for this purpose any distinction has been drawn between goods on board a neutral vessel at the outbreak of hostilities and goods embarked on a neutral vessel during the course of a war. Their Lordships, therefore, are not impressed by the argument based on the dearth of actual decisions on the point. . . .

With regard to the general statements contained in text-books on international law, it is to be observed that none of those cited in support of the appellants' contention appears to have been based on any discussion of the point in issue. On the contrary, they are for the most part based on a discussion of the effect of the Declaration of Paris. Their Lordships do not think that any useful purpose would be served by examining these statements in detail. They will take one example only, that cited from Westlake's *International Law*, part 2, p. 145. The author has been discussing the effect of the Declaration of Paris, and sums up as follows: "We may therefore conclude that enemy ships and enemy goods on board them are now by international law the only enemy property which as such is capturable at sea." In their Lordships' opinion the meaning of such statements must be judged by the context. They cannot be taken apart from the context as intended to be an exhaustive definition of what is or is not now the subject of maritime prize. It might just as well be argued that because the writer in the present case uses the expression "capturable at sea," he must have thought that enemy goods in neutral ships lying in British ports or harbours were, notwithstanding the Declaration of Paris, still subject to capture. Such statements are in any case more than counterbalanced by statements contained in other well-recognized authorities. Thus, in addition to the passages quoted in *The Miramichi*, [1915] P. 73, at p. 79, from Dana's edition of *Wheaton's International Law*, it will be found that Halleck (*International Law*, 4th ed., vol. 2, p. 98) states that whatever bears the character of enemy property (with a few exceptions not material for the purpose of this case), if found upon the ocean or afloat in port, is liable to capture as a lawful prize by the opposite belligerent. It is the enemy character of the goods, and not the nationality of the ship on which they are embarked or the date of embarkation, which is the criterion of lawful prize. This is in full accordance with Lord Stowell's statement in *The Rebeckah*, 1 C. Rob. 227, of the manner in

which the Order of 1665 defining admiralty droits has been construed by usage.

Passing to the appellants' third argument, that based on the Declaration of Paris or the principle supposed to underlie such Declaration, it may be stated more fully as follows: Enemy goods on neutral territory were never the legitimate subject of maritime prize. Such goods could not be seized without an infringement of the rights of neutrals. The rights of neutrals are similarly infringed if enemy goods be seized on neutral ships, but the law of prize having for the most part been formulated and laid down by nations capable of exercising and able to exercise the pressure of sea power, the rights of neutrals have been ignored to this extent, that the capture of enemy goods in neutral vessels on the high seas or in ports or harbours of the realm has been deemed lawful capture. The Declaration of Paris is in fuller accordance with principle; it recognizes that no distinction can be drawn between neutral territory and neutral ships. To use Westlake's expression (International Law, part 2, p. 145), it assimilates neutral ships to neutral territory, recognizing that on both the authority of the neutral State ought (except possibly in the case of contraband) to be exclusive. So far, the argument proceeds logically, but its next step is, in their Lordships' opinion, open to considerable criticism. If, say the appellants, neutral ships are assimilated, as on principle they should be, to neutral territory, British ships ought to be in like manner assimilated to British territory. Whatever may have been the case in earlier times, no one will now contend that the private property of enemy subjects found within the realm at the commencement of a war can be seized and appropriated by the Crown. The same ought, therefore, to hold of enemy goods found in British ships at the commencement of war. This part of the argument is, in their Lordships' opinion, quite fallacious. The Declaration of Paris, in effect, modified the rules of our Prize Courts for the benefit of neutrals. It was based on international comity, and was not intended to modify the law applicable to British ships or British subjects in cases where neutrals were not concerned. Its effect may possibly be summed up by saying that it assimilates neutral ships to neutral territory, but it is impossible to base on this assimilation any argument for the immunity of enemy goods in British ships. The cases are not *in pari materia*. If the Crown has ceased to exercise its ancient rights to seize and appropriate the goods of enemy subjects on

land, it is because the advantage to be thus gained has been small compared with the injury thereby entailed on private individuals, or in order to ensure similar treatment of British goods on enemy territory. But one of the greatest advantages of sea power is the ability to cripple an enemy's external trade, and for this reason the Crown's right to seize and appropriate enemy goods on the high seas or in territorial waters or the ports or harbours of the realm has never been allowed to fall into desuetude. In order in the fullest degree to attain this advantage of sea power our Courts have always upheld the right of seizing such goods even when in neutral bottoms, and neutrals have always admitted or acquiesced in the exercise of that right, either because it was deemed to be a legitimate exercise of sea power in time of war, or because on some future occasion they themselves might be belligerents and desire to exercise a similar right on their own behalf. Those who were responsible for the Declaration of Paris had not to weigh the advantage to be gained by the seizure of enemy goods on neutral ships against the injury thereby inflicted on private owners, but against the demands of international comity. The fact that we sacrificed on the altar of international comity a considerable part of the advantages incident to power at sea is no legitimate reason for making a further sacrifice where no question of international comity can possibly arise.

Their Lordships hold, therefore, on this part of the case, that enemy goods on British ships, whether on board at the commencement of the hostilities or embarked during the hostilities, always were, and still are, liable to be seized as prize, either on the high seas or in the ports or harbours of the realm. It follows that the petroleum seized on board the Roumanian was properly condemned as prize. . . .

THE LUSITANIA.

PETITION OF CUNARD STEAMSHIP COMPANY,
LIMITED.

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF
NEW YORK. 1918.
251 Fed. 715.

In Admiralty. In the matter of the petition of the Cunard Steamship Company, Limited, as owner of the steamship Lusitania, for limitation of its liability. . . .

MAYER, District Judge. On May 1, 1915, the British passenger carrying merchantman Lusitania sailed from New York, bound for Liverpool, with 1257 passengers and a crew of 702, making a total of 1959 souls on board, men, women and children. At approximately 2:10 on the afternoon of May 7, 1915, weather clear and sea smooth, without warning, the vessel was torpedoed and went down by the head in about 18 minutes, with an ultimate tragic loss of life of 1195. Numerous suits having been begun against the Cunard Steamship Company, Limited, the owner of the vessel, this proceeding was brought in familiar form, by the steamship company, as petitioner, to obtain an adjudication as to liability, and to limit petitioner's liability to its interest in the vessel and her pending freight, should the court find any liability. . . .

[The learned judge then finds, upon examination of the facts, that the vessel was seaworthy in the highest degree; that it was amply equipped with life-saving devices; that her equipment was in excellent order; that her captain and other officers were competent and experienced and her crew good; that adequate boat drills were held; that she was not and never had been armed; and that she carried no explosives in her cargo.]

Having thus outlined the personnel, equipment, and cargo of the vessel, reference will now be made to a series of events preceding her sailing on May 1, 1915. On February 4, 1915, the Imperial German government issued a proclamation as follows:

"Proclamation.

"1. The waters surrounding Great Britain and Ireland, including the whole English Channel, are hereby declared to be war zone. On and after the 18th of February, 1915, every

enemy merchant ship found in the said war zone will be destroyed without its being always possible to avert the dangers threatening the crews and passengers on that account.

"2. Even neutral ships are exposed to danger in the war zone, as in view of the misuse of neutral flags ordered on January 31 by the British government, and of the accidents of naval war, it cannot always be avoided to strike even neutral ships in attacks that are directed at enemy ships.

"3. Northward navigation around the Shetland Islands, in the eastern waters of the North Sea, and in a strip of not less than 30 miles width along the Netherlands coast is in no danger.

"Von Pohl,

"Chief of the Admiral Staff of the Navy.

"Berlin, February 4, 1915."

This was accompanied by a so-called memorial, setting forth the reasons advanced by the German government in support of the issuance of this proclamation, an extract from which is as follows:

"Just as England declared the whole North Sea between Scotland and Norway to be comprised within the seat of war, so does Germany now declare the waters surrounding Great Britain and Ireland, including the whole English Channel, to be comprised within the seat of war, and will prevent by all the military means at its disposal all navigation by the enemy in those waters. To this end it will endeavor to destroy, after February 18 next, any merchant vessels of the enemy which present themselves at the seat of war above indicated, although it may not always be possible to avert the dangers which may menace persons and merchandise. Neutral powers are accordingly forewarned not to continue to intrust their crews, passengers or merchandise to such vessels."

To this proclamation and memorial the government of the United States made due protest under date of February 10, 1915. On the same day protest was made to England by this government regarding the use of the American flag by the Lusitania on its voyage through the war zone on its trip from New York to Liverpool of January 30, 1915, in response to which, on February 19, Sir Edward Grey, Secretary of State for Foreign Affairs, handed a memorandum to Mr. Page, the American ambassador to England, containing the following statement:

"It was understood that the German government had announced their intention of sinking British merchant vessels at

sight by torpedoes, without giving any opportunity of making any provisions for saving the lives of non-combatant crews and passengers. It was in consequence of this threat that the Lusitania raised the United States flag on her inward voyage and on her subsequent outward voyage. A request was made by the United States passengers who were embarking on board her that the United States flag should be hoisted, presumably to insure their safety."

The British ambassador, Hon. Cecil Spring Rice, on March 1, 1915, in a communication to the American Secretary of State, regarding an economic blockade of Germany, stated in reference to the German proclamation of February 4th:

"Germany has declared that the English Channel, the north and west coasts of France, and the waters around the British Isles are a war area, and has officially notified that all enemy ships found in that area will be destroyed and that neutral vessels may be exposed to danger. This is in effect a claim to torpedo at sight, without regard to the safety of the crew or passengers, any merchant vessel under any flag. As it is not in the power of the German Admiralty to maintain any surface craft in these waters, this attack can only be delivered by submarine agency."

Beginning with the 30th of January, 1915, and prior to the sinking of the Lusitania on May 7, 1915, German submarines attacked and seemed to have sunk 20 merchant and passenger ships within about 100 miles of the usual course of the Lusitania, chased 2 other vessels, which escaped, and damaged still another.

It will be noted that nothing is stated in the German memorandum, *supra*, as to sinking enemy merchant vessels without warning, but, on the contrary, the implication is that settled international law as to visit and search, and an opportunity for the lives of passengers to be safeguarded, will be obeyed, "although it may not always be possible to avert the dangers which may menace persons and merchandise."

As a result of this submarine activity, the Lusitania, on its voyages from New York to Liverpool, beginning with that of January 30, 1915, steered a course further off from the south coast of Ireland than formerly. In addition, after the German proclamation of February 4, 1915, the Lusitania had its boats swung out and provisioned while passing through the danger zone, did not use its wireless for sending messages, and did not

stop at the Mersey bar for a pilot, but came directly up to its berth.

The petitioner and the master of the *Lusitania* received certain advices from the British Admiralty on February 10, 1915, as follows:

“Instructions with Reference to Submarines—10th February, 1915.

“Vessels navigating in submarine areas should have their boats turned out and fully provisioned. The danger is greatest in the vicinity of ports and off prominent headlands on the coast. Important landfalls in this area should be made after dark whenever possible. So far as is consistent with particular trades and state of tides, vessels should make their ports at dawn.”

On April 15 and 16, 1915, and after the last voyage from New York, preceding the one on which the *Lusitania* was torpedoed, the Cunard Company and the master of the *Lusitania* received at Liverpool the following advices from the British Admiralty:

“Confidential Daily Voyage Notice, 15th April, 1915, Issued under Government War Risks Scheme.

“German submarines appear to be operating chiefly off prominent headlands and landfalls. Ships should give prominent headlands a wide berth.”

Confidential memo., issued April 16, 1915:

“War experience has shown that fast steamers can considerably reduce the chance of successful surprise submarine attack by zigzagging—that is to say, altering the course at short and irregular intervals, say in ten minutes to half an hour. This course is almost invariably adopted by warships, when cruising in an area known to be infested by submarines. The underwater speed of a submarine is very low, and it is exceedingly difficult for her to get into position to deliver an attack, unless she can observe and predict the course of the ship attacked.”

Sir Alfred Booth, chairman of the Cunard Line, was a member of the War Risks Committee at Liverpool, consisting of ship-owners, representatives of the Board of Trade and the Admiralty, which received these instructions, and passed them on to the owners of vessels, including the Cunard Company, who distributed them to the individual masters.

On Saturday, May 1, 1915, the advertised sailing date of the *Lusitania* from New York to Liverpool on the voyage on which she was subsequently sunk, there appeared the following adver-

tisement in the New York Times, New York Tribune, New York Sun, New York Herald, and New York World; this advertisement being, in all instances except one, placed directly over, under, or adjacent to the advertisement of the Cunard Line regarding the sailing of the Lusitania:

"Travelers intending to embark on the Atlantic voyage are reminded that a state of war exists between Germany and her allies and Great Britain and her allies. That the zone of war includes the waters adjacent to the British Isles. That in accordance with formal notice given by the Imperial German government vessels flying the flag of Great Britain or of any of her allies are liable to destruction in those waters and that travelers sailing in the war zone on ships of Great Britain or her allies do so at their own risk.

"April 22, 1915.

Imperial German Embassy,
Washington, D. C."

This was the first insertion of this advertisement, although it was dated more than a week prior to its publication. Capt. Turner, the master of the vessel, saw the advertisement or "something of the kind" before sailing and realized that the Lusitania was included in the warning. The Liverpool office of the Cunard Company was advised of the sailing and the number of passengers by cable from the New York office, but no mention was made of the above quoted advertisement. Sir Alfred Booth was informed through the press of this advertisement on either Saturday evening, May 1st, or Sunday morning, May 2d.

The significance and construction to be given to this advertisement will be discussed *infra*, but it is perfectly plain that the master was fully justified in sailing on the appointed day from a neutral port with many neutral and noncombatant passengers, unless he and his company were willing to yield to the attempt of the German government to terrify British shipping. No one familiar with the British character would expect that such a threat would accomplish more than to emphasize the necessity of taking every precaution, to protect life and property, which the exercise of judgment would invite. And so, as scheduled, the Lusitania sailed, undisguised, with her four funnels and a figure so familiar as to be readily discernible, not only by naval officers and mariners, but by the ocean-going public generally.

The voyage was uneventful until May 6th. On approaching the Irish coast, on May 6th, the captain ordered all the boats

hanging on the davits to be swung out and lowered to the promenade deck rail, and this order was carried out under the supervision of Staff Capt. Anderson, who later went down with the ship. All bulkhead doors which were not necessary for the working of the ship were closed, and it was reported to Capt. Turner that this had been done. Lookouts were doubled, and two extra were put forward and one on either side of the bridge; that is, there were two lookouts in the crow's nest, two in the eyes of the ship, two officers on the bridge, and a quartermaster on either side of the bridge.

Directions were given to the engine room to keep the highest steam they could possibly get on the boilers and in case the bridge rang for full speed to give as much as they possibly could. Orders were also given that ports should be kept closed. At 7:50 p. m. on May 6th the Lusitania received the following wireless message from the Admiralty at Queenstown:

"Submarines active off south coast of Ireland."

And at 7:56 the vessel asked for and received a repetition of this message. The ship was then going at a rate of 21 knots per hour. At 8:30 p. m. of the same day the following message was received from the British Admiralty:

"To All British Ships 0005:

"Take Liverpool pilot at bar and avoid headlands. Pass harbors at full speed; steer mid-channel course. Submarines off Fastnet."

At 8:32 the Admiralty received a communication to show that this message had been received by the Lusitania, and the same message was offered to the vessel seven times between midnight of May 6th and 10 a. m. of May 7th. At about 8 a. m. on the morning of May 7th, on approaching the Irish coast, the vessel encountered an intermittent fog or Scotch mist, called "banks" in seafaring language and the speed was reduced to 15 knots. Previously, the speed, according to Capt. Turner's recollection, had been reduced to 18 knots. This adjustment of speed was due to the fact that Capt. Turner wished to run the last 150 miles of the voyage in the dark, so as to make Liverpool early on the morning of May 8th, at the earliest time when he could cross the bar without a pilot.

Judging from the location of previous submarine attacks, the most dangerous waters in the Lusitania's course were from the entrance to St. George's Channel to Liverpool bar. There is no dispute as to the proposition that a vessel darkened is much

safer from submarine attack at night than in the daytime, and Capt. Turner exercised proper and good judgment in planning accordingly as he approached dangerous waters. It is futile to conjecture as to what would or would not have happened had the speed been higher prior to the approach to the Irish coast, because, obviously, until then, the captain could not figure out his situation, not knowing how he might be impeded by fog or other unfavorable weather conditions.

On the morning of May 7, 1915, the ship passed about 25 or 26, and, in any event, at least $18\frac{1}{2}$ miles south of Fastnet, which was not in sight. The course was then held up slightly to bring the ship closer to land, and a little before noon land was sighted, and what was thought to be Brow Head was made out. Meanwhile, between 11 a. m. and noon, the fog disappeared, the weather became clear, and the speed was increased to 18 knots. The course of the vessel was S. 87° E. mag. At 11:25 a. m. Capt. Turner received the following message:

"Submarines active in southern part of Irish Channel last heard of 20 miles south of Coningbeg Light vessel make certain Lusitania gets this."

At 12:40 p. m. the following additional wireless message from the Admiralty was received:

"Submarines 5 miles south of Cape Clear proceeding west when sighted at 10 a. m."

After picking up Brow Head, and at about 12:40 p. m., the course was altered in shore by about 30 degrees to about N. 63° or 67° E. mag., Capt. Turner did not recall which. Land was sighted which the captain thought was Galley Head, but he was not sure, and therefore held in shore. This last course was continued for an hour at a speed of 18 knots until 1:40 p. m., when the Old Head of Kinsale was sighted, and the course was then changed back to the original course of S. 87° E. mag. At 1:50 p. m. the captain started to take a four point bearing on the Old Head of Kinsale, and while thus engaged, and at about 2:10 p. m., as heretofore stated, the ship was torpedoed on the starboard side. Whether one, two, or three torpedoes were fired at the vessel cannot be determined with certainty. Two of the ship's crew were confident that a third torpedo was fired and missed the ship. While not doubting the good faith of these witnesses, the evidence is not sufficiently satisfactory to be convincing.

There was, however, an interesting and remarkable conflict of

testimony as to whether the ship was struck by one or two torpedoes, and witnesses, both passengers and crew, differed on this point, conscientiously and emphatically; some witnesses for claimants and some for petitioner holding one view, and others, called by each side, holding the opposite view. The witnesses were all highly intelligent, and there is no doubt that all testified to the best of their recollection, knowledge, or impression, and in accordance with their honest conviction. The weight of the testimony (too voluminous to analyze) is in favor of the "two torpedo" contention, not only because of some convincing direct testimony (as, for instance, Adams, Lehman, Morton), but also because of the unquestioned surrounding circumstances. The deliberate character of the attack upon a vessel whose identity could not be mistaken, made easy on a bright day, and the fact that the vessel had no means of defending herself, would lead to the inference that the submarine commander would make sure of her destruction. Further, the evidence is overwhelming that there was a second explosion. The witnesses differ as to the impression which the sound of this explosion made upon them—a natural difference, due to the fact, known by common experience, that persons who hear the same explosion, even at the same time, will not only describe the sound differently, but will not agree as to the number of detonations. As there were no explosives on board, it is difficult to account for the second explosion, except on the theory that it was caused by a second torpedo. Whether the number of torpedoes was one or two is relevant, in this case, only upon the question of what effect, if any, open ports had in accelerating the sinking of the ship. . . .

No transatlantic passenger liner, and certainly none carrying American citizens, had been torpedoed up to that time. The submarine, therefore, could lay their plans with facility to destroy the vessel somewhere on the way from Fastnet to Liverpool, knowing full well the easy prey which would be afforded by an unarmed, unconvoyed, well-known merchantman, which, from every standpoint of international law, had a right to expect a warning before its peaceful passengers were sent to their death. That the attack was deliberate, and long contemplated, and intended ruthlessly to destroy human life, as well as property, can no longer be open to doubt. And when a foe employs such tactics it is idle and purely speculative to say that the action of the captain of a merchant ship, in doing or not doing something, or in taking one course and not another, was a con-

tributing cause of disaster, or that, had the captain not done what he did, or had he done something else, then that the ship and her passengers would have evaded their assassins.

I find, therefore, as a fact, that the captain, and, hence, the petitioner, were not negligent. The importance of the cause, however, justifies the statement of another ground which effectually disposes of any question of liability.

It is an elementary principle of law that, even if a person is negligent, recovery cannot be had, unless the negligence is the proximate cause of the loss or damage.

There is another rule, settled by ample authority, viz. that, even if negligence is shown, it cannot be the proximate cause of the loss or damage, if an independent illegal act of a third party intervenes to cause the loss. . . . The question, then, is whether the act of the German submarine commander was an illegal act.

The United States courts recognize the binding force of international law. As was said by Mr. Justice Gray in *The Paquete Habana*, 175 U. S. 677, 700, 20 Sup. Ct. 290, 299 (44 L. Ed. 320):

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

At least, since as early as June 5, 1793, in the letter of Mr. Jefferson, Secretary of State, to the French minister, our government has recognized the law of nations as an "integral part" of the laws of the land. *Moore's International Law Digest*, I, p. 10; *The Scotia*, 14 Wall. 170, 187, 20 L. Ed. 822; *The New York*, 175 U. S. 187, 197, 20 Sup. Ct. 67, 44 L. Ed. 126; *Kansas v. Colorado*, 185 U. S. 125, 146, 22 Sup. Ct. 552, 46 L. Ed. 838; *Kansas v. Colorado*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956. To ascertain international law:

"Resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of commentators and jurists. . . . Such works are resorted to by judicial tribunals . . . for trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320 (and authorities cited).

Let us first see the position of our government, and then ascertain whether that position has authoritative support. Mr.

Lansing, in his official communication to the German government, dated June 9, 1915, stated:

"But the sinking of passenger ships involves principles of humanity which throw into the background any special circumstances of detail that may be thought to affect the cases—principles which lift it, as the Imperial German government will no doubt be quick to recognize and acknowledge, out of the class of ordinary subjects of diplomatic discussion or of international controversy. Whatever be the other facts regarding the Lusitania, the principal fact is that a great steamer, primarily and chiefly a conveyance for passengers, and carrying more than a thousand souls, who had no part or lot in the conduct of the war, was torpedoed and sunk without so much as a challenge or a warning, and that men, women, and children were sent to their death in circumstances unparalleled in modern warfare. The fact that more than one hundred American citizens were among those who perished made it the duty of the government of the United States to speak of these things, and once more, with solemn emphasis, to call the attention of the Imperial German government to the grave responsibility which the government of the United States conceives that it has incurred in this tragic occurrence, and to the indisputable principle upon which that responsibility rests. The government of the United States is contending for something much greater than mere rights of property or privileges of commerce. It is contending for nothing less high and sacred than the rights of humanity, which every government honors itself in respecting, and which no government is justified in resigning on behalf of those under its care and authority. Only her actual resistance to capture, or refusal to stop when ordered to do so for the purpose of visit, could have afforded the commander of the submarine any justification for so much as putting the lives of those on board the ship in jeopardy. This principle the government of the United States understands the explicit instructions issued on August 3, 1914, by the Imperial German Admiralty to its commanders at sea, to have recognized and embodied, as do the naval codes of all other nations, and upon it every traveler and seaman had a right to depend. It is upon this principle of humanity, as well as upon the law founded upon this principle, that the United States must stand. . . . The government of the United States cannot admit that the proclamation of a war zone from which neutral ships, have been warned to keep away may be made to

operate as in any degree an abbreviation of the rights either of American shipmasters or of American citizens bound on lawful errands as passengers on merchant ships of belligerent nationality. It does not understand the Imperial German government to question those rights. It understands it, also, to accept as established beyond question the principle that the lives of non-combatants cannot lawfully or rightfully be put in jeopardy by the capture or destruction of an unresisting merchantman, and to recognize the obligation to take sufficient precaution to ascertain whether a suspected merchantman is in fact of belligerent nationality, or is in fact carrying contraband of war under a neutral flag. The government of the United States, therefore, deems it reasonable to expect that the Imperial German government will adopt the measures necessary to put these principles into practice in respect of the safeguarding of American lives and American ships, and asks for assurances that this will be done." White Book of Department of State, entitled "Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, European War No. 2," at page 172. Printed and distributed October 21, 1915.

The German government found itself compelled ultimately to recognize the principle insisted upon by the government of the United States, for, after considerable correspondence, and on May, 4, 1916 (after the *Sussex* had been sunk), the German government stated:

"The German submarine forces have had, in fact, orders to conduct submarine warfare in accordance with the general principles of visit and search and destruction of merchant vessels as recognized by international law; the sole exception being the conduct of warfare against the enemy trade carried on enemy freight ships that are encountered in the war zone surrounding Great Britain. . . . The German government, guided by this idea, notifies the government of the United States that the German naval forces have received the following orders: In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance."

See Official Communication by German Foreign Office to Am-

bassador Gerard, May 4, 1916 (White Book No. 3 of Department of State, pp. 302, 305).

There is, of course, no doubt as to the right to make prize of an enemy ship on the high seas, and, under certain conditions, to destroy her, and equally no doubt of the obligation to safeguard the lives of all persons aboard, whether passengers or crew. . . .

The observation in Vattel's Law of Nations is peculiarly applicable to the case of the *Lusitania*:

"Let us never forget that our enemies are men. Though reduced to the disagreeable necessity of prosecuting our right by force of arms, let us not divest ourselves of that charity which connects us with all mankind. Thus shall we courageously defend our country's rights without violating those of human nature. Let our valor preserve itself from every stain of cruelty and the luster of victory will not be tarnished by inhuman and brutal actions."

In addition to the authorities *supra* are the regulations and practices of various governments. In 1512, Henry VIII issued instructions to the Admiral of the Fleet which accord with our understanding of modern international law. Hosack's Law of Nations, p. 168. Such has been England's course since. 22 Geo. II, c. 33 § 2, subsec. 9 (1749); British Admiralty Manual of Prize Law 188, §§ 303, 304.

Substantially the same rules were followed in the Russian and Japanese regulations, and probably in the codes or rules of many other nations. Russian Prize Regulations, March 27, 1895 (cited in Moore's Digest, vol. 7, p. 518); Japanese Prize Law of 1894, art. 22 (cited in Moore, *supra*, vol. 7, p. 525); Japanese Regulations, March 7, 1904 (see Takahashi's Cases on International Law during Chino-Japanese War).

The rules recognized and practiced by the United States, among other things, provide:

"(10) In the case of an enemy merchantman it may be sunk but only if it is impossible to take it into port, and provided always that the persons on board are put in a place of safety." U. S. White Book, European War, No. 3, p. 192.

These humane principles were practiced, both in the War of 1812 and during our own war of 1861-1865. Even with all the bitterness (now happily ended and forgotten) and all the difficulties of having no port to which to send a prize, Capt. Semple of the *Alabama*, strictly observed the rule as to human life,

going so far as to release ships because he could not care for the passengers. But we are not confined to American and English precedents and practices.

While acting contrary to its official statements, yet the Imperial German government recognized the same rule as the United States, and, prior to the sinking of the Lusitania, had not announced any other rule. The war zone proclamation of February 4, 1915, contained no warning that the accepted rule of civilized naval warfare would be discarded by the German government. Indeed, after the Lusitania was sunk, the German government did not make any such claim, but, in answer to the first American note in reference to the Lusitania, the German Foreign Office, per Von Jagow, addressed to Ambassador Gerard a note, dated May 18, 1915, in which, *inter alia*, it is stated in connection with the sinking of the British steamer Falaba:

"In the case of the sinking of the English steamer Falaba, the commander of the German submarine had the intention of allowing passengers and crew ample opportunity to save themselves. It was not until the captain disregarded the order to lay to and took to flight, sending up rocket signals for help, that the German commander ordered the crew and passengers by signals and megaphone to leave the ship within 10 minutes. As a matter of fact he allowed them 23 minutes, and did not fire the torpedo until suspicious steamers were hurrying to the aid of the Falaba." White Book No. 2, U. S. Department of State, p. 169.

Indeed, as late as May 4, 1916, Germany did not dispute the applicability of the rule, as is evidenced by the note written to our government by Von Jagow, of the German Foreign Office, an extract from which has been quoted *supra*.

Further, section 116 of the German Prize Code (Huberich & King translation, p. 68), in force at the date of the Lusitania's destruction, conformed with the American rule. It provided:

"Before proceeding to a destruction of the vessel, the safety of all persons on board, and, so far as possible, their effects, is to be provided for, and all ship's papers and other evidentiary material, which, according to the views of the persons at interest, is of value for the formulation of the judgment of the prize court, are to be taken over by the commander."

Thus, when the Lusitania sailed from New York, her owner and master were justified in believing that, whatever else had

theretofore happened, this simple, humane, and universally accepted principle would not be violated. Few, at that time, would be likely to construe the warning advertisement as calling attention to more than the perils to be expected from quick disembarkation and the possible rigors of the sea, after the proper safeguarding of the lives of passengers by at least full opportunity to take to the boats.

It is, of course, easy now, in the light of many later events, added to preceding acts, to look back and say that the Cunard Line and its captain should have known that the German government would authorize or permit so shocking a breach of international law and so foul an offence, not only against an enemy, but as well against peaceful citizens of a then friendly nation. But the unexpected character of the act was best evidenced by the horror which it excited in the minds and hearts of the American people.

The fault, therefore, must be laid upon those who are responsible for the sinking of the vessel, in the legal as well as moral sense. It is therefore not the Cunard Line, petitioner, which must be held liable for the loss of life and property. The cause of the sinking of the *Lusitania* was the illegal act of the Imperial German government, acting through its instrument, the submarine commander, and violating a cherished and humane rule observed, until this war, by even the bitterest antagonists. As Lord Mersey said:

“The whole blame for the cruel destruction of life in this catastrophe must rest solely with those who plotted and with those who committed the crime.”

But while, in this lawsuit, there may be no recovery, it is not to be doubted that the United States of America and her Allies will well remember the rights of those affected by the sinking of the *Lusitania*, and, when the time shall come, will see to it that reparation shall be made for one of the most indefensible acts of modern times.

The petition is granted, and the claims dismissed, without costs.

NOTE.—The right of visit and search was one of the first belligerent rights to obtain recognition. As early as the reign of Edward III (1327-1377), resistance to visit and search was held to justify condemnation. In 1512, more than a century before Grotius' great work

appeared, Henry VIII gave these instructions:

If any Shippe or Shippes of the Flete mete any other Shippes or Vessels on the See, or in Porte or Portes, making Rebellion, Resistance, or Defence, ayenst them, then it is lawfull for them to assaulte and take theym with strong hand, to bring them holy and entierly to the said Admiral without dispoyllng, rifelyng, or enbeselyng of the Goods, or doing harme to the Parties, ther t'abyde th' Ordinance of the Lawe, as the said Admirall shall awarde.

Rymer, *Foedera*, VI, Part I, 32.

The right of visit and search is strictly a war right and may be exercised only in time of war, *Le Louis* (1817), 2 *Dodson*, 210, 245; *The Marianna Flora* (1826), 11 *Wheaton*, 1; *The Ship Rose* (1901), 36 *Ct. Cl.* 290; *The Brig Fair American* (1904), 39 *Ib.* 184. Hence in the absence of treaty, merchant vessels may not be stopped by the cruisers of other countries on suspicion that they are engaged in the slave trade, *The Antelope* (1825), 10 *Wheaton*, 66. The right may be exercised only in belligerent waters or on the high seas, *The Vrow Anna Catherina* (1806), 5 *C. Robinson*, 15. The search must be conducted with due regard to the rights and safety and convenience of the vessel detained, *The Anna Maria* (1817), 2 *Wheaton*, 327, and when that is done any incidental injury resulting from detention is *damnum absque injuria* which must be submitted to, *The Eleanor* (1817), 2 *Wheaton*, 345; *The Juno* (1914), 1 *Br. & Col. P. C.* 151; *The Tredegar Hall* (1915), 1 *Ib.* 492. Since a belligerent has a right to search all merchant vessels on the high seas, resistance to search is a wrong which justifies condemnation, *The Ship Rose* (1901), 36 *Ct. Cl.* 290; *The Schooner Jane* (1901), 37 *Ib.* 24, and forfeits neutral protection, *Maley v. Shattuck* (1806), 3 *Cranch*, 458; *The Balgorry* (1865), 2 *Wallace*, 474. The same penalty was imposed in the case of an attempted rescue by a neutral crew after capture, *The Catharina Elizabeth* (1804), 5 *C. Robinson*, 232, but mere flight unaccompanied by resistance does not warrant condemnation, *The Mentor* (1810), *Edwards*, 207. The use of fraudulent devices to evade capture justifies the condemnation of the ship, *The Aphrodite* (1905), 2 *Hurst & Bray*, 240. Acceptance of a belligerent convoy is constructive resistance,—that is, it is such an abandonment of neutrality and alliance with the enemy as will justify a belligerent in attacking without first searching, *The Elsebe* (1804), 5 *C. Robinson*, 173; *The Nancy* (1892), 27 *Ct. Cl.* 99; *The Sea Nymph* (1901), 36 *Ib.* 369; *The Ship Galen* (1901), 37 *Ib.* 89. Whether a neutral ship under the convoy of a neutral war vessel is exempt from search was long a subject of controversy. Until 1908 Great Britain refused to recognize such a result, but in the Declaration of London, articles 61 and 62, she admitted the right of convoy. A vessel may also be condemned if it sails under an enemy license, *The Julia* (1814), 8 *Cranch*, 181; *The Aurora* (1814), 8 *Ib.* 203; *The Hiram* (1816), 1 *Wheaton*, 440; *The Ariadne* (1817), 2 *Ib.* 143; *The Adula* (1900), 176 *U. S.* 361. A vessel

may be seized if her papers are not in proper form, *The Sarah* (1801), 3 C. Robinson, 330; *The Dos Hermanos* (1817), 2 Wheaton, 76; *The Pizarro* (1817), 2 Ib. 227; *The Caroline* (1855), Spinks, 252; *The Peterhoff* (1866), 5 Wallace, 28. Neutral goods found upon an armed enemy merchantman have been condemned by British prize courts, *The Fanny* (1814), 1 Dodson, 443, but this seems to be unduly rigorous and in such cases American prize courts release the goods, *The Nereide* (1815), 9 Cranch, 388. Neutral property which is fraudulently blended with enemy property shares the fate of the latter, *The St. Nicholas* (1816), 1 Wheaton, 417; *The Fortuna* (1818), 3 Ib. 236. The right of capture was much restricted by the adoption in 1856 of the four rules of the Declaration of Paris (*ante*, 12), the second and third of which exempted from capture all neutral goods except contraband, and all enemy goods in neutral ships except contraband. But goods on an enemy ship bound to an enemy port are *prima facie* enemy goods, and a neutral claimant of such goods must satisfy the court by clear proof, *The Roland* (1915), 31 T. L. R. 357. Enemy goods which have been voluntarily removed from a neutral ship and placed in lighters at once lose the protection of the neutral flag and are subject to seizure, *The Anastassios Koroneos* (Malta, 1915), 1 Br. & Col. P. C. 519. On the history of the Declaration of Paris, see Sir Francis Pigott, *The Declaration of Paris, 1856*, which contains many documents.

Enemy ships and all enemy goods thereon are liable to capture and condemnation if taken on the high seas even though the vessel set sail before the outbreak of war and the captain was unaware of the existence of war at the time of capture, *The Perkeo* (1914), 1 Br. & Col. Prize Cases, 136. As to what constitutes capture see *The Pellworm* (1922), L. R. [1922] 1 A. C. 292. Before the entrance of Italy into the Great War goods in India belonging to an English house were hypothecated to the Calcutta branch of a German bank and shipped on an Austrian vessel to an Italian port where they were seized after the outbreak of war between Italy and Austria. The Italian Prize Court held that the title to the goods vested in the enemy bank and that consequently they were subject to capture, *The Moravia*, *Gazzetta Ufficiale*, Jan. 29, 1917. Neutral goods which were seized in the same vessel were released. See also *The Aldworth* (1914), 31 T. L. R. 36, as to the capture of enemy goods on a British ship, and *The Schlesien* (no. 2) (1916), 2 Br. & Col. P. C. 268, as to the capture of enemy goods on enemy ships which entered a British port before the outbreak of war. Goods cannot be condemned as enemy goods unless they were enemy property at the time of seizure even though they may become enemy property before the issue of a writ claiming their condemnation, *The Orteric* (1920), L. R. [1920] A. C. 724. The capture of any vessel on the high seas is justified if there is a reasonable suspicion of illegitimate traffic, of enemy cargo, of unneutral service or of any cause which would justify condemnation. The fact that the captor proved to be mistaken does not make his act unlawful if he acted upon reasonable grounds, *The George* (1815), 1 Mason, 24; *The Ostsee*

(1855), 9 Moore, P. C. 150; and the justification of his action may be determined by evidence obtained after the seizure, *The Falk* (1921), L. R. [1921] 1 A. C. 787. A steamer which had formerly been the British steamer *Ceylon* but which had recently changed its name to *Davenger* and had taken out a Norwegian registry and which was commanded by a captain with an English name was captured by a German cruiser and sunk because she did not have on board the documents required by the Norwegian law to prove her nationality. Later it was ascertained that the vessel was in reality a neutral vessel, but the action of the captain of the German cruiser was sustained, *The Davenger* (1917), *Entscheidungen*, 232. In *The Hasenkamp* (1915), *Entscheidungen*, 50, the German Prize Court held that the seizure of a Dutch fishing vessel on suspicion that it was rendering unneutral service was justified by the presence of four persons on board whose names did not appear in the crew list. The suspicion was not established and the vessel was released, but the owner was refused damages for detention. In the case of *The Star* (1915), *Entscheidungen*, 66, a Swedish vessel which was bound for Russia was suspected of carrying contraband, and as it could not be thoroughly searched at the place of seizure it was taken to a German port and unloaded. No contraband was found. The owners' claim for damages was rejected on the ground that much of the cargo consisted of machinery packed in heavy boxes which could not be examined at sea. In *The Kaipara* (1917), *Entscheidungen*, 288, a British steamer loaded with neutral cargo at Montevideo before the outbreak of war was sunk because of the proximity of British cruisers. The neutral owner's claim for damages was rejected on the ground that since the sinking of the ship was lawful there was no reason for indemnifying the neutral owners. In *The Glitra* (1915), *Entscheidungen*, 34, claims of neutral owners of cargo lost on a British ship sunk by a German submarine were rejected. The German Prize Court held that since the sinking of the vessel was lawful the goods, even though not themselves subject to capture, must share the fate of the vessel. Such a loss was said to be analogous to damage to neutral private property in a town bombarded by the enemy.

The captor of goods seized as prize is a bailee and must use due care for their preservation, *The William* (1806), 6 C. Robinson, 316. If he insures the goods and they are restored to the owner, he is not entitled to reimbursement of the cost of the insurance if the expense was incurred for his own protection, *The Catherine and Anna* (1801), 4 C. Robinson, 39; *The Cairnsmore* (1920), L. R. [1921] 1 A. C. 439; but if the goods were insured for the benefit of the owner the captor is entitled to his costs, *The United States* (1920), L. R. [1920] P. 431. It would seem to follow that a captor who fails to insure goods in his possession is not exercising due care, but in *The New Sweden* (1921), 126 L. T. R. 31, it was held to the contrary.

Goods of neutrals in the custody of a prize court for adjudication may under certain conditions be requisitioned. This right was asserted in *The Memphis* (1862), Blatchford, 202; *The Ella Warley* (1862), *Ib.* 204; *The Stephen Hart* (1863), *Ib.* 387. British prize

courts have passed upon the question in only two cases,—The *Curlew*, The *Magnet* (Nova Scotia, 1812), Stewart, 312, and The *Zamora* (1916), L. R. [1916] 2 A. C. 77. The latter is the best discussion of the subject in the books, and the conclusion of the Privy Council is thus stated:

A belligerent Power has by international law the right to requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.

There has been much difference of opinion as to when the title to captured property passes. Hall, somewhat diffidently, concludes that title passes when the captured property has been brought into a place so secure that the owner can have no immediate prospect of recovering it. Westlake holds that the captor's title may not be disputed by the enemy. The general practice of maritime countries is to require that prizes should be brought within the territorial jurisdiction of the captor where the validity of the seizure may be examined in a judicial proceeding. This practice is to be commended. If only the interests of the two belligerents were concerned, the mere fact of capture might be recognized as sufficient to transfer title; but if the captured vessel were sold to a neutral who might then be subject to a claim on the part of the original owner, the neutral owner, in the absence of a judicial decree, would find it difficult to defend his title. Condemnation by a prize court has the great advantage that it establishes the fact that the capture was made in accordance with recognized rules of law. When the validity of the capture is thus determined, title relates back to the date of seizure. Hence if a vessel is lost after its seizure and before condemnation, the original owner who had insured his vessel against loss cannot recover on his policy, *Andersen v. Marten* (1908), L. R. [1908] A. C. 334. For an adverse criticism of this decision see *Harvard Law Review*, XXI, 55. The subject was fully considered in *The Anthippi* (Italy, 1917), *Gazzetta Ufficiale*, June 2, 1917. It follows that a vessel and cargo may be condemned after the conclusions of peace, *The Australia* (Japan, 1906), 2 Hurst & Bray, 373, *The Montara* (Japan, 1906), 2 *Ib.* 403, even though the seizure may have been made after the conclusion of an armistice, *The Rannveig* (1920), L. R. [1920] P. 177.

Ever since the war between the United States and Mexico, when the American Government allowed mail steamers to enter and depart from Vera Cruz at will, a sentiment in favor of the exemption of the mails

from visit and search has been growing up and found expression in the Eleventh Hague Convention of 1907, which declared "postal correspondence of neutrals or belligerents" to be inviolable. There would seem to be no reason, however, why contraband carried in the mails should be treated any differently from contraband carried in any other way. In the Great War, the wide use made of the parcel post for the carriage of such contraband articles as rubber, wool, and even revolvers (400 revolvers were found in the mails on one steamer) naturally led to a strict construction of the term "postal correspondence," *The Tubantia* (1916), 32 T. L. R. 529. The subject is ably discussed in Secretary Lansing's note of May 24, 1916, to the British Ambassador, criticised in *Am. Jour. Int. Law*, X, 580. See also Allin, "Belligerent Interference with Mails," *Minnesota Law Review*, I, 293.

On the whole subject see the able brief of Richard Henry Dana in *The Prize Cases* (1863), 2 Black, 635, 650; Atherley-Jones, chs. v-viii; Pyke, *The Law of Contraband of War*, ch. xv; *Int. Law Topics*, 1905, 9, 48, 107; *Ib.* 1913, 113; *Int. Law Situations*, 1901, 99; *Ib.* 1907, 60; *Ib.* 1911, 37; Earl Loreburn, *Capture at Sea*, chs. ii and iii; Cobbett, *Cases and Opinions*, II, 132, 478; Bonfils (Fauchille), secs. 1269, 1396; Hyde, II, 433, 491; Moore, *Digest*, VII, ch. xxiv.

SECTION 3. TRANSFERS OF ENEMY PROPERTY.

THE VROW MARGARETHA.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1799.

1 C. Robinson, 336.

This was a case of a cargo of brandies, shipped by Spanish merchants in Spain, in May, 1794, before Spanish hostilities, and transferred to Mr. Berkeymyer at Hamburgh, during their voyage to Holland. . . .

SIR W. SCOTT [LORD STOWELL]—This is a claim of Mr. Ph. Berkeymyer of Hamburgh for some parcels of wine which were seized on board three Dutch vessels detained by order of government in 1795. The ships have been since condemned; the cargoes were described in the ship's papers, as far as the property was expressed, as belonging to Spanish merchants. It is material, in this case, to consider the relative situation of the countries from which and to which these cargoes were going. Spain and Holland were then in alliance with this country and at war with France; it might, therefore, be an inducement with a Spanish merchant, to conceal the property of his goods, although it does not appear to have existed in any great degree, as the goods were coming under an English convoy, and as they

were shipped "as Spanish wines," and destined, avowedly, to Holland; there was, therefore, nothing in this part of the case to mislead our cruisers. Mr. Berkeleymyer is allowed to be an inhabitant of Hamburgh, although he had made a journey, a short time previous to the shipment of these cargoes, to Spain, (where he had resided some years before,) to settle his affairs, and bring off the property which he had left behind him. He had quitted Spain, however, previous to the breaking out of Spanish hostilities, and had resumed his original character of a merchant of Hamburgh.—The account which he gives of his transactions in Spain, as far as they regard this case, is, that he entered into a contract with two Spanish houses for some wines, which were at the time actually shipped; and *in itinere* towards Holland. The first objection that has been taken is, that such a transfer is invalid, and cannot be set up in a Prize Court, where the property is always considered to remain in the same character in which it was shipped till the delivery. If that could be maintained, there would be an end of the question, because it has been admitted that these wines were shipped as Spanish property, and that Spanish property is now become liable to condemnation. But I apprehend it is a position which cannot be maintained in that extent. In the ordinary course of things in time of peace—for it is not denied that such a contract may be made, and effectually made (according to the usage of merchants) such a transfer *in transitu* might certainly be made. It has even been contended, that a mere delivering of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery; but that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, and all others, cannot well be doubted. When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did [not] exist, all goods shipped in the enemy's country, would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu*; and in that sense I recognize it as the rule of this

Court. But this arises, as I have said, out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in a time of peace. The transfer, therefore, must be considered as not invalid in point of law, at the time of the contract; and being made before the war, it must be judged according to the ordinary rules of commerce.

It has been farther objected to the validity of this contract, that a part of the wines did actually reach Holland, where they were sold, and the money was detained by the consignees in payment of the advances which they had made. It is said that this annuls the contract—to the extent of that part it may do so, and the deficiency must be made up to the purchaser by other means; but it appears that it has been actually supplied by bills of exchange, and an assignment of other wines sent to Petersburg. It is not for me to set aside the whole contract on that partial ground, or to construe the defect in the execution of the contract so rigorously as to extend it to those wines which never went to Holland, and which never became *de facto* subject to be detained by the consignees. They are free for the contract to act upon; and if the parties are desirous of adhering to their contract in its whole extent, it does not become other persons to obstruct them.

It comes then to a question of fact, whether it was a *bona fide* transfer or not? I think the time is a strong circumstance to prove the fairness of the transaction. Had it happened three months later, there might have been reason to alarm the prudence of Spanish merchants, and induce them to resort to the expedient of covering their property.—But at the time of the contract there seems to have been no reason for apprehension, and therefore there is nothing to raise any suspicion on that point. . . . The impression upon my mind is, that it is a fair transaction. . . . Mr. Berkeleymyer's claims were restored without opposition.

THE BALTICA.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1857.
11 Moore, Privy Council, 141.

On appeal from the High Court of Admiralty of England.

[War being imminent between Russia and Great Britain, the owner of the Russian ship *Baltica*, a Dane long domiciled at Libau, Russia, sold the vessel to his son, who was a citizen of Denmark. At the time of the sale the vessel was in transit from Libau to Copenhagen with a cargo consigned to Leith, Scotland. On its arrival at the Danish port, it was delivered to the purchaser, the Danish flag was raised over it, and it was registered as a Danish vessel. Two months later, it sailed from Copenhagen to Leith, and upon arrival at that port it was seized as prize. The Crown argued that the sale of the vessel to a Danish citizen was invalid because made while the vessel was *in transitu*.]

The Right Hon. T. PEMBERTON LEIGH [LORD KINGSDOWN]:
. . . The general rule is open to no doubt. A neutral while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee, is good also against a Captor, if war afterwards unexpectedly breaks out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change this property as against Captors, as long as the ship or goods remain *in transitu*. . . .

The only question of law which can be raised in this case, is not whether a transfer of a ship or goods *in transitu*, is ineffectual to change the property, as long as the state of *transitus* lasts; but how long that state continues, and when, and by what means, it is terminated.

In order to determine the question, it is necessary to consider upon what principle the rule rests, and why it is that a sale

which would be perfectly good if made while the property was in a neutral port, or while it was in an enemy's port, is ineffectual if made while the ship is on her voyage from one port to the other. There seem to be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is, that the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent Powers, until the voyage is at an end.

The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding Captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the Courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient; that in order to defeat the Captors, the possession, as well as the property, must be changed before the seizure. It is true that, in one sense, the ship and goods may be said to be *in transitu* till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner. . . .

There can be no manner of doubt, therefore, that at this time [i. e. when the vessel sailed from Copenhagen for Leith] the ship had come fully into the possession of the purchaser, and thereupon, according to the principles already referred to, the *transitus*, in the sense in which for this purpose the word is used, had ceased. . . .

Their Lordships will report to Her Majesty their opinion, that . . . an order for restitution [should be made.]

THE BENITO ESTENGER.

SUPREME COURT OF THE UNITED STATES. 1900.
176 U. S. 568.

Appeal from the District Court of the United States for the Southern District of Florida.

[The Benito Estenger was captured by a public vessel of the United States off the coast of Cuba on June 27, 1898, taken to the port of Key West, Florida, libelled, and condemned. From the decree of condemnation the claimant appeals on the ground, *inter alia*, that the vessel at the time of capture was no longer a Spanish vessel, having been transferred on June 9, 1898, to a British subject and registered at Kingston, Jamaica, as a British vessel. The principal question was as to the validity of this transfer. Further facts appear in the opinion of the court.]

Mr. Chief Justice FULLER, after stating the case, delivered the opinion of the court.

If the alleged transfer was colorable merely, and Messa was the owner of the vessel at the time of capture, did the District Court err in condemning the Benito Estenger as lawful prize as enemy property?

"Enemy property" is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law. The general rule is that in war the citizens or subjects of the belligerents are enemies to each other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership. And by the law of prize, property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character and attaches to it all the penal consequences. Prize Cases, 2 Black, 635, 674; The Sally, 8 Cranch, 382, 384; Jecker v. Montgomery, 18 How. 110; The Peterhoff, 5 Wall. 28; The Flying Scud, 6 Wall. 263. . . .

Thus far we have proceeded on the assumption that the transfer of the Benito Estenger was merely colorable, and this, if so, furnished in itself ground for condemnation. A brief examination of the evidence, in the light of well-settled principles, will show that the assumption is correct.

Messa's story of the transfer was that the steamer had been owned by Gallego, Messa and Company, and then by himself; that he was compelled to sell in order to get money to live on; that he made the sale for \$40,000, for which, or a large amount of which, credit was given on an indebtedness of Messa to Beattie and Company, and that he was employed by Beattie to go on the vessel as his representative and business manager.

. . . .

In short, the statements as to price were conflicting; the reason assigned for the sale was to get money to live on, and yet apparently no money passed, and Messa said that he received credit for a large part of the consideration on indebtedness to claimant's firm; claimant himself refused to describe the payment or payments; the Spanish master and crew remained in charge; Messa went on the voyage as supercargo; the vessel continued in trade, which, in this instance, at least, appeared to be plainly trade with the enemy; and, finally, it is said by claimant's counsel in his printed brief: "It will not be contended upon this appeal that all the interest of Mr. Messa in the Benito Estenger ceased on June 9, 1898. The transfer was obviously made to protect the steamer as neutral property from Spanish seizure. That Mr. Messa, however, still retained a beneficial interest after this sale and transfer of flags, and continued to act for the vessel as supercargo, has not been disputed."

The attempt to break the force of this admission by the contention that the change of flag was justifiable as made to avoid capture by the Spanish is no more than a reiteration of the argument that Messa was a Cuban rebel, and his vessel a Cuban vessel, which, as has been seen, we have been unable to concur in. If the transfer were invalid, she belonged to a Spanish subject, she was engaged in an illegal venture, and her owner cannot plead his fear of Spanish aggression.

Transfers of vessels *flagrante bello* were originally held invalid, but the rule has been modified, and is thus given by Mr. Hall, who, after stating that in France "their sale is forbidden, and they are declared to be prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of the war;" says: "In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war." International Law (4th ed.), 525. And to the same effect is Mr. Justice Story in his Notes on the Principles and Practice of Prize Courts, (Pratt's ed.) 63; 2 Wheat. App. 30: "In respect to the trans-

fers of enemies' ships during the war, it is certain that purchases of them by neutrals are not, in general, illegal; but such purchases are liable to great suspicion; and if good proof be not given of their validity by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of a neutral claim; . . . and if after such transfer the ship be employed habitually in the enemy's trade, or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. . . . Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether."

The *Sechs Geschwistern*, 4 C. Rob. 100, is cited, in which Sir William Scott said: "This is the case of a ship asserted to have been purchased of the enemy; a liberty which this country has not denied to neutral merchants, though by the regulation of France it is entirely forbidden. The rule which this country has been content to apply is, that property so transferred must be *bona fide* and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest, vitiates a contract of his description altogether."

In *The Jemmy*, 4 C. Rob. 31, the same eminent jurist observed: "This case has been admitted to farther proof, owing entirely to the suppression of a circumstance, which if the court had known, it would not have permitted farther proof to have been introduced; namely, that the ship has been left in the trade, and under the management of her former owner. Wherever that fact appears, the court will hold it to be conclusive, because, from the *evidentia rei*, the strongest presumption necessarily arises, that it is merely a covered and pretended transfer. The presumption is so strong that scarcely any proof can avail against it. It is a rule which the court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship, and yet retain the management of it, as a neutral vessel, it would be impossible for the court to protect itself against frauds."

And in *The Omnibus*, 6 C. Rob. 71, he said: "The court has often had occasion to observe, that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade, not all the swearing in the world will convince it that it is a genuine transaction."

The rule was stated by Judge Cadwalader of the Eastern Dis-

trict of Pennsylvania thus: "The rule of decision in some countries has been that, as to a vessel, no change of ownership during hostilities can be regarded in a prize court. In the United States, as in England, the strictness of this rule is not observed. But no such change of property is recognized where the disposition and control of a vessel continue in the former agent of the former hostile proprietors; more especially when, as in this case, he is a person whose relations of residence are hostile." *The Island Belle*, 13 Fed. Cases, 168. . . .

In *The Soglasie*, *Spinks Prize Cases*, 104, Dr. Lushington held the *onus probandi* to be upon the claimant, and made these observations: "With regard to documents of a formal nature, though when well authenticated they are to be duly appreciated, it does not follow that they are always of the greatest weight, because we know, without attributing blame to the authorities under which they issue, they are instruments often procured with extraordinary facility. What the court especially desires is, that testimony which bears less the appearance of formality, —evidence natural to the transaction, but which often carries with it a proof of its own genuineness; the court looks for that correspondence and other evidence which naturally attends the transaction, accompanies it, or follows it, and which when it bears upon the face of it the aspect of sincerity, will always receive its due weight."

In *The Ernst Merck*, *Spinks Prize Cases*, 98, the sale was to neutrals of Mecklenburg shortly before the breaking out of war, and it was ruled that the onus of giving satisfactory proof of the sale was on the claimant, and without it the court could not restore, even though it was not called on to pronounce affirmatively that the transfer was fictitious and fraudulent. In that case the vessel was condemned partly because of absence of proof of payment, Dr. Lushington saying: "We all know that one of the most important matters to be established by a claimant is undoubted proof of payment."

To the point that the burden of proof was on the claimant see also *The Jenny*, 5 Wall. 183; *The Amiable Isabella*, 6 Wheat. 1; *The Lilla*, 2 Cliff. 169; *Story's Prize Courts*, 26.

We think that the requirements of the law of prize were not satisfied by the proofs in regard to this transfer, and on all the evidence are of opinion that the court below was right in the conclusion at which it arrived.

Decree affirmed.

MR. JUSTICE SHIRAS, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM dissented.

THE SOUTHFIELD.

ADMIRALTY DIVISION (IN PRIZE) OF THE HIGH COURT OF JUSTICE OF ENGLAND. 1915.

1 British and Colonial Prize Cases, 332.

Suit for condemnation of cargo as prize.

[On July 16, 1914, the British steamship Southfield left Novorossiisk, a Russian Black Sea port, with a cargo of barley shipped by a firm of German merchants, and consigned "to order, Emden." During the voyage the goods were sold to two Dutch merchants, Henkers and Barghoorn, carrying on business in Holland. The dealings with Henkers took place between July 20 and July 27 and those with Barghoorn between July 24 and July 31. Both merchants at once re-sold to customers of their own. War broke out between Great Britain and Germany on August 4. The Southfield reached England August 8, and her cargo was seized as prize and sold. The Dutch merchants claim the proceeds on the ground that their title was complete and was not acquired in contemplation of war.]

SIR SAMUEL EVANS (THE PRESIDENT). . . . It is important to examine closely the principle which governs the right of capture of goods transferred *in transitu*, and to ascertain accurately its limits, as it is sometimes apt to be loosely stated.

In order to deduce the rule, it will be sufficient, I think, to refer to two leading cases, and to one authorized text book. I take them in order of date. [His Lordship here quoted from *The Vrow Margaretha*, 1 C. Robinson, 336, the passage beginning, "In the ordinary course of things in time of peace," *ante*, 580.]

In the work of Mr. Justice Story on *The Principles and Practice of Prize Courts*, that celebrated jurist states the rule in the following passage (Pratt's Edition, pp. 64-65): "In respect to the proprietary interests in cargoes, though, in general, the rules

of the common law apply, yet there are many peculiar principles of prize law to be considered; it is a general rule, that, during hostilities, or imminent and impending danger of hostilities, the property of parties belligerent cannot change its national character during the voyage, or, as it is commonly expressed, *in transitu*. This rule equally applies to ships and cargoes; and it is so inflexible that it is not relaxed, even in owners who become subjects by capitulation after the shipment and before the capture. . . . The same distinction is applied to purchases made by neutrals of property *in transitu*; if purchased during a state of war existing or imminent, and impending danger of war, the contract is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery. It is otherwise, however, if a contract be made during a state of peace, and without contemplation of war; for, under such circumstances, the Prize Courts will recognize the contract and enforce the title acquired under it. . . . The reason why Courts of Admiralty have established this rule as to transfers *in transitu* during a state of war or expected war, is asserted to be, that if such a rule did not exist all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect."

[His Lordship then quoted the passage from *The Baltica*, 11 Moore, Privy Council, 141, beginning with the words, "The general rule is open to no doubt," *ante*, 582.]

It might be argued that according to these authorities transfers *in transitu* are invalid against belligerent captors upon the intervention of war unless there is actual delivery before capture; or, in other words, that if war has intervened no transfer by documents alone can defeat the right of capture. But, in my opinion, that proposition is too wide, and is not an accurate delimitation of the true rule. In the passages cited Lord Stowell speaks of "a state of war existing or imminent"; Mr. Justice Story of "a state of war existing or imminent and impending danger of war"; and Lord Kingsdown of "war, either actual or imminent," of "war unexpectedly breaking out" (contrasting it with "a time of peace, without prospect of war"), and of "transactions during war or in contemplation of war," . . .

In my view the element that the vendor contemplated war, and had the design to make the transfer in order to secure himself and to attempt to defeat the rights of belligerent captors, is necessarily involved in the rule which invalidates such transfers.

Sales of goods upon ships afloat are now of such common occurrence in commerce that it would be too harsh a rule to treat such transfers as invalid unless such an element existed. . . .

As to the facts in these two cases, it is abundantly clear that the neutral purchasers acted with complete *bona fides* throughout; they paid for the goods, and re-sold them to neutral customers of their own before war was declared. This would not necessarily conclude the matter.

But I am also satisfied that the vendors did not have the war between their country and this country (to which the ship carrying the goods belonged) in contemplation when they sold the goods. The imminence of war between Germany and Russia has no materiality in considering these cases. In the light of after events, the war with this country may be spoken of as having been imminent, regarded from the point of view of time, in the last two weeks of July; but there is no evidence that it was regarded as imminent in its proper meaning of "threatening or about to occur" by German merchants at that time. . . . What the hidden anticipation of the Government of the German Empire might have been upon the subject it is not for me to speculate; but I may express my humble opinion that our intervention in the war upon the invasion of Belgium in defence of treaty obligations, against the breach of such obligations by the invaders, was a complete surprise even to their Government. . . .

On the grounds that the German vendors had no thought of the imminence of war between Germany and this country, and did not have such a war in contemplation at any time while the transactions of sale were taking place or before they were completed, I hold that the sales to the two Dutch merchants were valid, and that the goods were not confiscable. And I decree the release to them respectively of the net proceeds of the sale of their respective goods, which are now in Court.

THE BAWEAN.

ADMIRALTY DIVISION (IN PRIZE) OF THE HIGH COURT OF JUSTICE OF
ENGLAND. 1917.

Law Reports [1918] P. 58.

Action for condemnation of cargo. . . .

In July, 1914, the German steamship Kleist loaded at a Chinese port 922 cases of tea which had been bought by, and were consigned to the order of, the firm of Michaelsen & Sons, of Bremen. The Kleist was bound for Hamburg, but in consequence of the outbreak of war she took refuge on August 7, 1914, in the Dutch port of Padang in Sumatra, where she remained.

In May, 1916, the cargo being still on board, Michaelson & Sons sold the tea to the claimants, Goldschmidt & Zonen, a firm of Dutch merchants at Amsterdam, and it was transhipped into the Dutch steamship Bawean. Fresh bills of lading were made out dated September 6, 1916, whereby the tea was consigned by L. E. Tels & Co., the claimants' agents in Padang, to the claimants at London, where it was arranged that a firm of brokers, Batten & Co., should sell it for them. On September 19 the claimants sent a cheque for the purchase price 7119.68fl., to Michaelsen & Sons, who acknowledged its receipt on September 28. It appeared, however, from other documents produced by the claimants that the purchase was really made for the joint account of the claimants and L. E. Tels & Co. On December 12 the Bawean arrived in London, and the cases of tea were discharged and warehoused at a wharf in the Port of London. On January 24, 1917, they were seized as prize as belonging at the time of capture and seizure to enemies of the Crown. . . .

THE PRESIDENT (SIR SAMUEL EVANS). . . . Now I have to ask myself two questions—one a question of law and the other a question of fact.

What in fact was the meaning and object of the plan which was adopted? I have no doubt that the intention of Michaelson & Sons, and a very natural one, was to save something from the burning. They had a valuable cargo of tea; it might become useless if they kept it longer, while if they themselves transhipped it it might suffer risk, and, as I have said, they wanted

to get something out of the burning. It was no good sending it to Germany; so they went to Goldschmidt. Goldschmidt & Zonen knew the whole situation. They knew that the Kleist was a North German Lloyd ship. They knew that she had taken refuge in this far-away port for a year and nine months, and they were minded, I have no doubt, to make some profit for themselves; but they were also minded—I do not like to use the word conspiracy, but I do not know that it is too strong—to enter into a little conspiracy with Michaelsen & Sons whereby Michaelsen & Sons would get some benefit out of this property which had practically become abandoned, and they would also make a profit for themselves. The object on the part of both, in my view, was to defraud the belligerents of their rights of capture, and partially to assist the enemy owners; and with that object, and by the arrangement made through Tels & Co., the goods were transhipped from the German vessel into the Bawean. There was a communication with the consuls, and, putting it shortly, the result of the communication was this: Tels & Co. asked for the consent of the British vice-consul in Padang, and afterwards of the British consul in Batavia to the shipment, and afterwards proceeded as if consent had been given. That is the reading in plain English of the documents. Tels & Co. must have represented to the people concerned that there was no objection on the part of the consul, and in one sense that was literally true, but not in the sense in which it was accepted by the parties. The answer of the consul at Batavia to the vice-consul or his deputy at Padang was this: "Your telegram to-day, tea to London, I shall not object to shipment since system referred to in my despatch of 29th July is not yet in operation." That is to say, I will take no active step to prevent it. Then it proceeds: "The question as to whether shipment is in order rests entirely with Tels Company, and you should express no official opinion in matter and give no official assistance by way of certificate or otherwise."

That did not authorize the vice-consul at Padang to express the opinion as coming from the consul at Batavia that he had no objection to the shipment. The statement of fact in the telegram was "I am not going to take any steps to object," but the instructions given by the consul were "You must express no official opinion." To say that he had no objection would be expressing an opinion. In this way the goods were got on to the Bawean from the Kleist.

Now what is the effect in law? It is quite clear law according to the Prize Courts in this country, and in America too (and I think in Germany also), that goods which belong to an enemy when they are once shipped, and therefore become subject to the risk of capture at the hands of belligerents, will retain their enemy character until they reach their destination, and no transfer to a neutral will be effective so as to defeat the right of capture unless the transferee has actually taken possession of the goods. Now I think the destination of these goods, in the sense of that principle of law, was the destination of Hamburg. In my view the goods could not be transhipped from a German vessel on to another vessel with the destination changed so as to affect the rights of a belligerent. If that is not so, the effect of it would be that at the beginning of the war all cargoes upon German ships which might then be afloat, if they could be transferred, might legally be transferred to any neutral, and, therefore, all these cargoes would escape capture. That, I think, is not prize law. The doctrine has been laid down quite clearly in cases beginning with *The Vrow Margaretha*, 1 C. Rob. 336, and extending to later dates. I am not going through them; but perhaps it is as well to refer to two cases. In *The Jan Frederick*, 5 C. Rob. 127, 131, 140, the question was fully gone into by Sir William Scott, and he lays down the principles in general terms. I will cite a few passages only. "But in time of war this is prohibited as a vicious contract; being a fraud on belligerent rights, not only in the particular transaction, but in the great facility which it would necessarily introduce, of evading those rights beyond the possibility of detection. It is a road that, in time of war, must be shut up; for although honest men might be induced to travel it with very innocent intentions, the far greater proportion of those who passed, would use it only for sinister purposes, and with views of fraud on the rights of the belligerent. . . . If the contemplation of war leads immediately to the transfer, and becomes the foundation of a contract, that would not otherwise be entered into on the part of the seller; and this is known to be so done, in the understanding of the purchaser, though on his part there may be other concurrent motives . . . such a contract cannot be held good, on the same principle that applies to invalidate a transfer *in transitu* in time of actual war." And in discussing the question as to whether the contract was entered into bona fide, at the end of the judgment Sir William Scott pronounced as follows: "But

taking it to be a bona fide contract, yet being formed *in transitu*, for the purpose of withdrawing the property from capture, it does intimately partake of the nature of those contracts, which have in the repeated decisions of this, and of the Supreme Court, been pronounced null and invalid; and I pronounce this property subject to condemnation." The ground there put is this: to allow such transfers while the goods were in transit after the outbreak of war (and the same doctrine applies before the outbreak of war if it is imminent, or if the transaction takes place in contemplation of war) would be to encourage frauds on the rights of capture by belligerents. You cannot always prove the object in a man's mind. I have stated what, in the inference I draw, was one of the objects Goldschmidt & Zonen had in view in this case, but I cannot say that there is an absolute proof of it. But in order to close any investigation in the difficult matter of determining motives the law has pronounced that such transfers as this cannot be valid during war because it would be so easy thereby to defeat the rights of belligerents.

There is only one other case that I want to refer to, namely, *The Carl Walter*, (1802) 4 C. Rob. 207. I cite that case because it illustrates the same principle and shows that it does not matter that the goods have been changed from one ship to another. Nor, in my view, does it matter that after the change of the goods from an enemy vessel to another constructive possession is taken by the master of the vessel and a destination for some other country substituted in the hope that the goods would not be seized before their actual receipt or delivery. On both these grounds—the ground of my inference as to the facts, and on the question of law—I hold that this transfer to Messrs. Goldschmidt & Zonen was invalid, and that the goods still partook of an enemy character at the time that they were upon the sea after they were transferred to the Dutch vessel and when they were seized.

One other circumstance must be adverted to. Counsel for the claimants contended that they were entitled to some protection because the goods were under the Dutch flag. In my view of the case the Declaration of Paris does not apply; but in any event, in the circumstances of this case, the Dutch flag had ceased to protect these goods. They were in port at the time they were seized, and, according to previous judgments in this Court, if the Declaration of Paris ever was a protection to this vessel (and I have expressed my opinion that it was not) it had

ceased to have any such effect at the time the goods were seized in port, after they were discharged from the Dutch ship.

I, therefore, condemn these goods or their proceeds.

NOTE.—The transfer of enemy ships either in anticipation of war or in the midst of war offers so many opportunities for fraud that such transactions are regarded by prize courts with great suspicion. In the following cases vessels which had been transferred to neutrals were condemned for the reasons indicated: The *Sechs Geschwistern* (1801), 4 C. Robinson, 100 (seller retained right to repurchase after the war); The *Vigilantia* (1798), 1 C. Robinson, 1, The *Embsen* (1798), 1 Ib. 16, The *Ernst Merck* (1854), Spinks, 98 (vessel transferred to a neutral continued in former trade); The *Bernon* (1798), 1 C. Robinson, 102, The *Jemmy* (1801), 4 Ib. 31, The *Andromeda* (1864), 2 Wallace, 481 (management of vessel retained by former owner); The *General Hamilton* (1805), 6 C. Robinson, 61 (transfer of enemy vessel in a blockaded port to a neutral); The *Johann Christoph* (1854), Spinks, 60, The *Rapid* (1854), Ib. 80 (no proof of payment of purchase price); The *Tommi* and The *Rothersand* (1914), L. R. [1914] P. 251 (vessel still flying an enemy flag). On the other hand, in The *Ariel* (1857), 11 Moore, P. C. 119, a sale which was admittedly made in contemplation of war was held valid because the transfer was undoubtedly bona fide. The decisions in The *Baltica* (1857), 11 Moore, P. C. 141 and The *Bawean* (1917), L. R. [1918] P. 58 were analyzed and distinguished in The *Vesta* (1921), L. R. [1921] 1 A. C. 774, and both in that case and in The *Kronprinzessen Margareta* (1920), L. R. [1921] 1 A. C. 486, the validity of the transfer of an enemy ship or cargo to a neutral is made to depend not only upon the fact that the former owner has parted with all his interest but that there has been an actual delivery, as contrasted with a transfer by documents, to the buyer.

The sale to a neutral of an enemy ship of war lying in a neutral port is invalid, The *Minerva* (1807), 6 C. Robinson, 396, even though it has been dismantled and fitted up as a merchant ship, The *Georgia* (1867), 7 Wallace, 32.

France, Germany and Russia have heretofore treated all transfers of enemy vessels made after the outbreak of war as absolutely invalid. Austria-Hungary and Japan have followed the Anglo-American rule as to the recognition of transfers which can be shown to be bona fide. But the Great War has cut across this alignment and has resulted in the curious situation that whether a transfer is recognized as valid or not depends on which member of a group of allied states passes upon it. Thus the *Dacia*, a German vessel lying in an American port and purchased by an American citizen after the outbreak of war and admitted to American registry, would be regarded under the old British rule as an American vessel since there was nothing in the facts to impeach the good faith of the transaction and the sale had been completed by delivery to the purchaser. But the vessel was captured by a French cruiser and was condemned as a German vessel by the French Prize Court. See the decision in *Am. Jour. Int. Law*.

IX, 1015. The Anglo-American rule whereby the validity of a transfer is determined by its bona fide character is preferable to the rule followed by France, Germany and Russia, but it is eminently desirable that the nations should be in agreement upon some rule. The Declaration of London, Art. 56, provides that a transfer after the opening of hostilities is void, "unless it is proved that such transfer was not made in order to evade the consequence which the enemy character of the vessel would involve." In its practical application this amounts almost to an adoption of the French rule, for most of the transfers of vessels from enemy to neutral flags after the outbreak of war are for the purpose of evading the consequences of enemy character. Furthermore, to throw upon the purchaser the burden of proving an innocent state of mind on the part of the seller at the time of the transfer—an event which may have happened many months before the capture—is to require a practical impossibility. If the purchaser can show that there was a genuine transfer in which the vendor parted with all his interest in the vessel and that the transfer of ownership was completed by delivery, the purchaser's title should be everywhere recognized. In *The Edna* (1919), L. R. [1919] P. 157, Lord Sterndale considered the case of a vessel which had been transferred from the Mexican to the German flag just before the outbreak of war. Immediately after hostilities began, it was reconveyed to a Mexican company controlled by Germans, who sold it to an American corporation. Lord Sterndale held that as the purchase was bona fide on the part of the American corporation, it was not a transfer made in order to avoid the consequences to which an enemy vessel would be exposed. On appeal the Judicial Committee was also convinced that there had been a complete and bona fide transfer and ordered the vessel's release, [1921] 1 A. C. 735.

For an excellent treatment of the subject see J. W. Garner, "The Transfer of Merchant Vessels from Belligerent to Neutral Flags," *Am. Law Rev.* XLIX, 321. See also *Int. Law Topics*, 1906, 21; *Ib.* 1913, 155; *Int. Law Situations*, 1910, 108; Russell T. Mount, "Prize Cases in the English Courts Arising out of the Present War," *Col. Law Rev.* XV, 316, 567; Cobbett, *Cases and Opinions*, II, 144, 163; Hyde, II, 551, 564; Moore, *Digest*, VII, 404.

SECTION 4. THE RIGHTS OF INTERMEDIATE PARTIES.

THE ODESSA.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1915.
Law Reports [1916] 1 A. C. 145.

Consolidated Appeals from two decrees of the Prize Court (England) . . . reported as to the Odessa, [1915] P. 52.

[All that pertains to the Woolston is omitted.] The appellants in both appeals were . . . bankers carrying on business in London. . . . The cargo [of the Odessa], consisting of nitrate of soda, was sold by a Chilean firm to a German company carrying on business at Hamburg, and was shipped in May, 1914, "bound for Channel for orders." In June, 1914, the appellants accepted bills of exchange for 41,153*l.* 1*s.* 5*d.* (the price of the cargo) drawn by the sellers, and as security received and held the bill of lading which made the cargo deliverable to them or to their assigns. On August 4, 1914, while the ship was on her voyage, war broke out between Great Britain and Germany, and on August 19, 1914, the ship was captured at sea. A writ was issued by the Procurator-General claiming that the ship and cargo belonged to enemies of the Crown and were liable to confiscation as lawful prize. The appellants claimed the cargo alleging that it was their property and / or as holders of the bill of lading for full value.

The President of the Probate, Divorce and Admiralty Division (Sir Samuel Evans), . . . held that the cargo was the property of the German company and that the appellants were merely pledgees and not entitled to have the cargo released to them; he therefore made a decree condemning the cargo as lawful prize.

LORD MERSEY. . . , Their Lordships are of opinion that the learned President was right in the inferences which he drew from the facts, namely, that the general property in the cargo was in the German company, and that the appellants were merely pledgees thereof at the date of the seizure. . . . The appellants indeed did not dispute the correctness of these inferences, but what they say is that, though correct, they do not justify a decree which has the effect of forfeiting their rights as pledgees. Thus the question in the appeal is whether in case of a pledge such as existed here a Court of Prize ought to condemn the cargo, and, if so, whether it should direct the appellants' claim to be paid out of the proceeds to arise from the sale thereof.

It is worth while to recall generally the principles which have hitherto guided British Courts of Prize in dealing with a claim by a captor for condemnation. All civilized nations up to the present time have recognized the right of a belligerent to seize, with a view to condemnation by a competent Court of Prize,

enemy ships found on the high seas or in the belligerent's territorial waters and enemy cargoes. But seizure does not, according to British prize law, affect the ownership of the thing seized. Before that can happen the thing seized, be it ship or goods, must be brought into the possession of a lawfully constituted Court of Prize, and the captor must then act for and obtain its condemnation as prize. The suit may be initiated by the representative of the capturing State, in this country by the Procurator-General. It is a suit *in rem*, and the function of the Court is to inquire into the national character of the thing seized. If it is found to be of enemy character, the duty of the Court is to condemn it; if not, then to restore it to those entitled to its possession. The question of national character is made to depend upon the ownership at the date of seizure, and is to be determined by evidence. The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure and to transfer it as from that date to the Sovereign or to his grantees. The thing—the *res*—is then his for him to deal with as he thinks fit, and the proceeding is at an end.

As the right to seize is universally recognized, so also is the title which the judgment of the Court creates. The judgment is of international force, and it is because of this circumstance that Courts of Prize have always been guided by general principles of law capable of universal acceptance rather than by considerations of special rules of municipal law. Thus it has come about that in determining the national character of the thing seized the Courts in this country have taken ownership as the criterion, meaning by ownership the property or *dominium* as opposed to any special rights created by contracts or dealings between individuals, without considering whether these special rights are or are not, according to the municipal law applicable to the case, proprietary rights or otherwise. The rule by which ownership is taken as the criterion is not a mere rule of practice or convenience; it is not a rule of thumb. It lays down a test capable of universal application, and therefore peculiarly appropriate to questions with which a Court of Prize has to deal. It is a rule not complicated by considerations of the effect of the numerous interests which under different systems of jurisprudence may be acquired by individuals either in or in relation to chattels. All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned. If in each case the Court of Prize had to investigate the municipal law of

a foreign country in order to ascertain the various rights and interests of every one who might claim to be directly or indirectly interested in the vessel or goods seized, and if in addition it had to investigate the particular facts of each case (as to which it would have few, if any, means of learning the truth), the Court would be subject to a burthen which it could not well discharge.

There is a further reason for the adoption of the rule. If special rights of property created by the enemy owner were recognized in a Court of Prize, it would be easy for such owner to protect his own interests upon shipment of the goods to or from the ports of his own country. He might, for example, in every case borrow on the security of the goods an amount approximating to their value from a neutral lender and create in favour of such lender a charge or lien or mortgage on the goods in question. He would thus stand to lose nothing in the transaction, for the proceeds of the goods if captured would, if recovered by the lender, have to be applied by him in discharge of his debt. Again, if a neutral pledgee were allowed to use the Prize Court as a means of obtaining payment of his debt instead of being left to recover it in the enemy's Courts, the door would be opened to the enemy for obtaining fresh banking credit for his trade, to the great injury of the captor belligerent.

Acting upon the principle of this rule Courts of Prize in this country have from before the days of Lord Stowell refused to recognize or give effect to any right in the nature of a "special" property or interest or any mortgage or contractual lien created by the enemy whose vessel or goods have been seized. Liens arising otherwise than by contract stand on a different footing and involve different considerations; but even as to these it is doubtful whether the Court will give effect to them. Where the goods have been increased in value by the services which give rise to the possessory lien, it appears to have been the practice of this Court to make an equitable allowance to the national or neutral lien-holder in respect of such services. In the judgment in *The Frances*, 8 Cranch, 418, speaking of freight, it is said: "On the one hand the captor by stepping into the shoes of the enemy owner of the goods is personally benefited by the labour of a friend, and ought in justice to make him proper compensation, and on the other, the shipowner, by not having carried the goods to the place of their destination, and this in consequence of the

act of the captor, would be totally without remedy to recover his freight against the owner of the goods."

It is, however, unnecessary to deal with the question of liens arising apart from contract, the present case being one of pledge founded on a contract made with the enemy.

When the authorities are examined it will be found that they bear out the view that enemy ownership is the true criterion of the liability to condemnation. The case of *The Tobago*, 5 C. Robinson, 218, is in point. There the claimant was a British subject. In time of peace he had honestly advanced money to a French shipowner to enable the latter to repair his ship which was disabled, and by way of security had taken from the owner a bottomry bond. Afterwards war broke out with France and the vessel was captured. In the proceedings in the Prize Court for condemnation the holder of the bottomry bond asked that his security might be protected, but Lord Stowell (then Sir William Scott), after observing that the contract of bottomry was one which the Admiralty Court regarded with great attention and tenderness, went on to ask: "But can the Court recognize bonds of this kind as titles of property so as to give persons a right to stand in judgment and demand restitution of such interests in a Court of Prize?" And he states that it had never been the practice to do so. He points out that a bottomry bond works no change of property in the vessel and says: "If there is no change of property there can be no change of national character. Those lending money on such security take this security subject to all the chances incident to it, and amongst the rest, the chances of war." . . . [The learned judge here reviews the authorities.]

The appellants urged that if the Court now applies the principles illustrated by the cases above referred to very serious injustice will be done to and serious loss incurred by neutrals or subjects who, before the commencement of the war and in the normal course of business, have made advances against bills of lading. It is to be observed that similar injustice and loss, though possibly on a less extensive scale, must have been occasioned by the application of the same rules in the eighteenth and early nineteenth centuries, and similar arguments were in fact addressed to Lord Stowell as a reason why they should not be applied in individual cases. The reason why such arguments cannot be sustained is fairly obvious. War must in its very nature work hardship to individuals, and in laying down rules to

be applied internationally to circumstances arising out of a state of war it would be impossible to avoid it. All that can be done is to lay down rules which, if applied generally by civilized nations, will, without interfering with the belligerent right of capture, avoid as far as may be any loss to innocent parties. It is precisely because the recognition of liens or other rights arising out of private contracts would so seriously interfere with the belligerent rights of capture that the Courts have refused to recognize such liens or rights in spite of the hardship which may be occasioned to individuals from such want of recognition. . . .

For the foregoing reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed. . . .

NOTE.—It may be questioned whether the court is correct in holding in *The Odessa* that the neutral appellants were merely pledgees while the legal ownership was vested in the German buyer. For a similar confusion see *The Orteric* (1920), L. R. [1920] A. C. 724. While the neutral's title was for security only, nevertheless it was a legal title, and it was so decided by the Italian Prize Court in *The Moravia* (1917), *Gazzeta Ufficiale*, Jan. 29, 1917, and by the British Prize Court in *The Miramichi* (1914), L. R. [1915] P. 71. If the court is correct in holding that the neutral appellant was merely a pledgee the exposition of his rights in a prize court is unexceptional. See comments on the English decisions by Professor Samuel Williston in *Harvard Law Review*, XXXIV, 756-758.

For the discussion of claims of various kinds set up by intermediate parties to the ship or cargo, see *The Aina* (1854), Spinks, 8, *The Hampton* (1866), 5 Wallace, 372, *The Marie Glaesser* (1914), L. R. [1914] P. 218 (mortgages); *The Vrou Sarah* (1803), 1 Dodson, 355n, *The Battle* (1867), 6 Wallace 498, *The Russia* (1904), Takahashi, 557 (claims for necessaries and disbursements); *The Sechs Geschwistern* (1801), 4 C. Robinson, 100, *The Marianna* (1805), 6 Ib. 24, *The Ida* (1854), Spinks, 26, *The Ariel* (1857), 11 Moore, P. C. 119 (liens for debt); *The Frances* (1814), 8 Cranch, 418 (factor's lien); *The Nigretia* (1905), Takahashi, 551 (salvage); *The Mary and Susan* (1816), 1 Wheaton, 25, *The Lynchburg* (1861), Blatchford, 3, *The Amy Warwick* (1862), 2 Sprague, 150, *The Carlos F. Roses* (1900), 177 U. S. 655 (assignment of bill of lading); *The Tobago* (1804), 5 C. Robinson, 218 (bottomry bond); *The Emil* (1915), 1 Br. & Col. P. C. 257 (mortgagee of captor's nation); *The Linaria* (1915), 31 T. L. R. 396 (advance on goods after arrival); *The Urna* (1920), L. R. [1920] A. C. 899 (advances by selling agent).

But a neutral carrier may have a lien for freight on enemy's goods, *The Hoop* (1799), 1 C. Robinson, 196; *The Hazard* (1815), 9 Cranch, 205; *The Ship Societe* (1815), 9 Ib. 209, *The Antonia Johanna* (1816), 1 Wheaton, 159. But if the goods are contraband or if the vessel is

engaged in the coasting trade of the enemy, no such lien is recognized, *The Emanuel* (1799), 1 C. Robinson, 296.

SECTION 5. EXEMPTIONS FROM CAPTURE.

THE PAQUETE HABANA.
THE LOLA.

SUPREME COURT OF THE UNITED STATES. 1900.
175 U. S. 677.

Appeals from the District Court of the United States for the Southern District of Florida.

[The Paquete Habana and the Lola, fishing smacks belonging to Spanish subjects resident in Cuba, on returning to Havana from a fishing expedition, were captured by the American blockading squadron, taken to Key West, libelled, condemned, and sold. From the decree of condemnation this appeal was taken on the ground that such vessels are by law exempt from seizure.]

MR. JUSTICE GRAY delivered the opinion of the Court. . . .

By an ancient usage among civilized nations, beginning centuries ago and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

This doctrine, however, has been earnestly contested at the bar; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work. . . . It is therefore, worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world. . . . [Here follows an elaborate review of the authorities.]

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considera-

tions of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast-fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish, which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

Calvo, in a passage already quoted, distinctly affirms that the exemption of coast-fishing vessels from capture is perfectly justiciable, or, in other words, of judicial jurisdiction or cognizance. Calvo, § 2368. Nor are judicial precedents wanting in support of the view that this exemption, or a somewhat analogous one, should be recognized and declared by a prize court.

By the practice of all civilized nations, vessels employed only for the purposes of discovery or science are considered as exempt from the contingencies of war, and therefore not subject to capture. It has been usual for the government sending out such an expedition to give notice to other powers; but it is not essential. 1 Kent Com. 91, note; Halleck, c. 20, § 22; Calvo, § 2376; Hall, § 138. analogy

In 1813, while the United States were at war with England, an American vessel, on her voyage from Italy to the United States, was captured by an English ship, and brought into Halifax in Nova Scotia, and with her cargo condemned as lawful prize by the Court of Vice Admiralty there. But a petition for the restitution of a case of paintings and engravings which had been presented to and were owned by the Academy of Arts in Philadelphia, was granted by Dr. Croke, the judge of that Court, who said: "The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation,

has likewise its modifications and relaxations of that rule. The arts and sciences are admitted, amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered not as the *peculium* of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species." And he added that there had been "innumerable cases of the mutual exercise of this courtesy between nations in former wars." The Marquis de Somerueles, Stewart Adm. (Nova Scotia), 445, 482.

In 1861, during the War of the Rebellion, a similar decision was made, in the District Court of the United States for the Eastern District of Pennsylvania, in regard to two cases of books belonging to and consigned to a university in North Carolina. Judge Cadwalader, in ordering these books to be liberated from the custody of the marshal, and restored to the agent of the university, said: "Though this claimant, as the resident of a hostile district, would not be entitled to restitution of the subject of a commercial adventure in books, the purpose of the shipment in question gives to it a different character. The United States, in prosecuting hostilities for the restoration of their constitutional authority, are compelled incidentally to confiscate property captured at sea, of which the proceeds would otherwise increase the wealth of that district. But the United States are not at war with literature in that part of their territory." He then referred to the decision in *Nova Scotia*, and to the French decisions upon cases of fishing vessels, as precedents for the decree which he was about to pronounce; and he added that, without any such precedents, he should have had no difficulty in liberating these books. *The Amelia*, 4 Philadelphia, 417. . . .

Ordered, that the decree of the District Court be reversed. . . .

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA, dissenting. . . .

NOTE.—As to the exemption of fishing vessels from capture in time of war see U. S. Naval Instructions Governing Maritime Warfare, June 30, 1917, no. 63 and no. 65; Prize Regulations of Japan, art. 35, 2 Hurst and Bray, 430; Prize Code of the German Empire, sec. 6; *The Michael* (Japan, 1905), 2 Hurst and Bray, 80; *The Alexander* (Japan, 1905), 2 *Ib.* 86. For early English practice see *The Young Jacob and Johanna* (1798), 1 C. Robinson, 20, and *The Liesbet van den Toll* (1804), 5 C. Robinson, 283. For the present English practice see *The Berlin* (1914), L. R. [1914] P. 265.

As to other exemptions from capture see *The Dalfje* (1800), 3 C. Robinson, 139; *La Gloire* (1804), 5 Ib. 198; *The Mary* (1804), 5 Ib. 200; *The Carolina* (1807), 6 Ib. 336; *The Rose in Bloom* (1811), 1 Dodson, 57; *The William Penn* (1815), Federal Cases, no. 3372 (cartel ships); *The Aryol* (Japan, 1905), Takahashi, 620 (hospital ships); *The Paklat* (Hong-Kong, 1915), 1 Br. & Col. P. C. 515 (philanthropic mission). A ship forfeits its exemption if it performs any service of a military nature or fails to act in good faith, *La Rosine* (1800), 2 C. Robinson, 372; *The Venus* (1803), 4 Ib. 355. A hospital ship which is equipped with wireless apparatus and which sends in a secret code messages of which it fails to keep a complete record is not entitled to the protection of Hague Convention no. 10, *The Ophelia* (1916), L. R. [1916] 2 A. C. 206. A school ship for the training of navigators is not a scientific ship exempt from capture, *The Compte de Smet de Naeyer* (Germany, 1916), *Entscheidungen*, 209. See also Hall, *International Law*, 7th ed. 473; Westlake, *International Law*, II, 133; Holtzendorff, *Handbuch des Völkerrechts*, IV, 585, Holland, *Prize Law*, sec. 36; Oppenheim, *International Law*, II, 234; Halleck, *International Law*, 4th ed., II, 124; Latiff, *Effects of War on Property*, ch. iv; Cobbett, *Cases and Opinions*, II, 169; Hyde, II, 510; Moore, *Digest*, VII, 424.

CHAPTER XV.

PRIZE LAW AND PRIZE COURTS.

THE FLAD OYEN.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1799.
1 C. Robinson, 135.

[The Flad Oyen, an English ship, was captured by a French privateer and taken to the neutral port of Bergen, Norway, where the French consul held a pretended prize court and ordered the vessel sold. On a voyage from Bergen to St. Martins she was captured by the British, and is now claimed by her purchaser at the sale ordered by the French consul. In the first part of his opinion the learned judge discusses the *bona fides* of the sale and finds it colorable.]

Sir W. SCOTT [LORD STOWELL]. . . . But another question has arisen in this case, upon which a great deal of argument has been employed; namely, Whether the sentence of condemnation which was pronounced by the French consul, is of such legal authority as to transfer the vessel, supposing the purchase to have been *bona fide* made? I directed the counsel for the claimants to begin; because, the sentence being of a species altogether new, it lay upon them to prove that it was nevertheless a legal one.

It has frequently been said, that it is the peculiar doctrine of the law of England to require a sentence of condemnation, as necessary to transfer the property of prize; and that according to the practice of some nations twenty-four hours, and according to the practice of others bringing *infra presidia*, is authority enough to convert the prize. I take that to be not quite correct; for I apprehend, that by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary; and that a neutral purchaser in Europe, during war, does look to the legal sentence of condemna-

tion as one of the title-deeds of the ship, if he buys a prize vessel. I believe there is no instance in which a man having purchased a prize vessel of a belligerent, has thought himself quite secure in making that purchase, merely because the ship had been in the enemy's possession twenty-four hours, or carried *infra presidia*: the contrary has been more generally held, and the instrument of condemnation is amongst those documents which are most universally produced by a neutral purchaser; that if she has been taken as prize, it should appear also that she has been, in a proper judicial form, subjected to adjudication.

Now, in what form have these adjudications constantly appeared? They are the sentences of courts acting and exercising their functions in the belligerent country; and it is for the very first time in the world, that, in the year 1799, an attempt is made to impose upon the court a sentence of a tribunal not existing in the belligerent country, but of a person pretending to be authorized within the dominions of a neutral country: in my opinion, if it could be shewn, that, regarding mere speculative general principles, such a condemnation ought to be deemed sufficient; that would not be enough; more must be proved; it must be shewn that it is conformable to the usage and practice of nations.

A great part of the law of nations stands on no other foundation: it is introduced, indeed, by general principles; but it travels with those general principles only to a certain extent: and, if it stops there, you are not at liberty to go farther, and to say, that mere general speculations would bear you out in a further progress: thus, for instance, on mere general principles it is lawful to destroy your enemy; and mere general principles make no great difference as to the manner by which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some, and prohibits other modes of destruction; and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes.

Now, it having been the constant usage, that the tribunals of the law of nations in these matters shall exercise their functions within the belligerent country; if it was proved to me in the clearest manner, that on mere general theory such a tribunal

might act in the neutral country; I must take my stand on the ancient and universal practice of mankind; and say that as far as that practice has gone, I am willing to go; and where it has thought proper to stop, there I must stop likewise.

It is my duty not to admit, that because one nation has thought proper to depart from the common usage of the world, and to treat the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution; merely because general theory might give it a degree of countenance, independent of all practice from the earliest history of mankind. The institution must conform to the text law, and likewise to the constant usage upon the matter; and when I am told, that before the present war, no sentence of this kind has ever been produced in the annals of mankind; and that it is produced by one nation only in this war; I require nothing more to satisfy me, that it is the duty of this Court to reject such a sentence as inadmissible.

Having thus declared that there must be an antecedent usage upon the subject, I should think myself justified in dismissing this matter without entering into any farther discussion.—But even if we look farther, I see no sufficient ground to say, that on mere general principles such a sentence could be sustained: proceedings upon prize are proceedings *in rem*; and it is presumed, that the body and substance of the thing, is in the country which has to exercise the jurisdiction. I have not heard any instances quoted to the contrary, excepting in a very few cases which have been urged, argumentatively, in the way which is technically called *ad hominem*, being cases of condemnations of British prizes carried into the ports of Lisbon and Leghorn: but in those the condemnations were pronounced by the High Court of Admiralty in England. The only cases are of two ships carried into foreign ports, and condemned in England by this Court; the very infrequency of such a practice shews the irregularity of it. Upon cases in the practice of other nations antecedent to the present war, the advocates have been silent.

Now, as to these condemnations of prizes carried to Lisbon and Leghorn, it has been said, that if the courts of Great Britain venture this degree of irregularity, other countries have a right to go farther. That consequence I deny: the true mode of correcting the irregular practice of a nation is, by protesting against it; and by inducing that country to reform it: it is monstrous to

suppose, that because one country has been guilty of an irregularity, every other country is let loose from the law of nations; and is at liberty to assume as much as it thinks fit.

Upon these ports of Lisborn and Leghorn it is to be remarked, that they have a peculiar and discriminate character, a character that to a certain degree assimilates them to British ports: the British exist there in a distinct character, under the protection of peculiar treaties; and with respect to Portugal, those treaties go so far as to engage, that if a ship belonging to one country shall be brought by its enemy into the ports of another, which happens to be at peace, this neutral country shall be bound to seize that ship, and restore it to its ally: to be sure no covenant can have more the effect of giving the ports of England and Portugal a reciprocal relation of a very peculiar sort—to make the British ports Portugese ports, and the Portugese ports British ports to a certain degree. Now, unless I am given to understand, that peculiar treaties between France and Denmark have impressed such a distinctive character upon the port of Bergen, I cannot allow that it can be considered, on the mere footing of general neutrality, to be a French port, exactly in the same manner in which London may be considered as a Portugese port, or Lisbon as a British port.

But supposing this possible, still it would not follow that such condemnations could be pleaded as authorities in the present case; because, in the first place, the validity of such condemnations themselves may be the subject of reasonable doubt.—For it by no means appears that the enemy, or neutrals, who might have an interest in contesting them, have ever acknowledged their validity. Whoever purchases under such sentences must be content to purchase them subject to all the questions that may arise upon their sufficiency.

But, 2dly, Supposing that no doubts could be entertained respecting the sufficiency of such sentences; it by no means follows that the efficacy of the present sentence can be supported: there the tribunal is acting in the country to which it belongs, and with whose authority it is armed. Here a person, utterly naked of all authority except over the subjects of his own country, and possessing that merely by the indulgence of the country in which he resides, pretends to exercise a jurisdiction in a matter in which the subjects of many other States may be concerned. No such authority was ever conceded by any country to a foreign agent of any description residing within it: and least of all

could such an authority be conceded in the matter of prize of war—a matter over which a neutral country has no cognizance whatever, except in the single case of an infringement of its own territory; and in which such a concession of authority cannot be made without departing from the duties, and losing the benefits, of its neutral character.

Mark the consequences which must follow from such a pretended concession: observe in the present case how it would affect the neutral character of the ports in the north! If France can station a judge of the Admiralty at Bergen, and can station there its cruisers to carry in prizes for that judge to condemn; who can deny that to every purpose of hostile mischief against the commerce of England, Bergen will differ from Dunkirk, in no other respect than this, that it is a port of the enemy to a much greater extent of practical mischief. To make the ports of Norway the seats of the French tribunals of war, is to make the adjacent sea the theatre of French hostility.

It gives one belligerent the unfair advantage of a new station of war, which does not properly belong to him; and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity.

Wisely, therefore, did the American government defeat a similar attempt made on them [by the French minister Genêt], at an earlier period of the war: they knew that to permit such an exercise of the rights of war, within their cities, would be to make their coasts a station of hostility.

Whether the government of Denmark has shewn equal vigilance in observing, or equal indignation in repelling the attempt, is more than I am warranted to assert: but though the publicity of the transaction in the town of Bergen may subject the police of that place to some degree of observation, I see nothing in the papers which issue immediately from the royal authority that at all affects the government itself with the knowledge and approbation of the fact; and indeed it would be indecent to suppose that a country, standing upon the footing of ancient and friendly alliance to this country, could have given its sanction to a measure so full of hostility to its friend, and of possible inconvenience to itself: I must, therefore, deem the act of this French consul a licentious attempt to exercise the rights of war

within the bosom of a neutral country, where no such exercise has ever been authorized.

I am of opinion upon the whole, that this ship must be restored to the British owners upon the usual salvage. . . .

CUSHING, ADMINISTRATOR, v. THE UNITED STATES.

COURT OF CLAIMS OF THE UNITED STATES. 1886.

22 Ct. Cl. 1.

[This was a rehearing of the questions involved in *Gray, Administrator v. The United States* (1886), 21 Court of Claims. 340, for which see *ante* 364. In the course of the argument, counsel for the defendant requested the court to find *inter alia* the following conclusions of law:

"11. That claimants had no valid claim against France, for the reason, among others, that they did not exhaust their remedies in the French courts by appeal or action upon the bond and against the property of the captor. . . .

13. It is universally admitted that the decree of a prize court is conclusive against all the world as to all matters decided and within its jurisdiction. . . . "

Only so much of the opinion is here given as relates to these requests.]

DAVIS, J., delivered the opinion of the court: . . .

The jurisdictional act requires us to inquire into legal condemnations, and it is urged on behalf of the defendants that all condemnations by the French courts are final and conclusive upon this court if the French court had jurisdiction. Many citations are made in support of this contention, among them is the case of *Baring and others v. The Royal Exchange Assurance Company* (5 East., 99 *et seq.*), which may be taken as a fair illustration.

The American ship *Rosanna*, insured by the defendants, was captured and condemned by the French, whereupon the plaintiffs sued on the policy and recovered. Lord Ellenborough, Ch. J., interrupting the argument, said:

"Does not this [French] sentence of condemnation proceed sufficiently on the ground of infraction of treaty between Ameri-

ca and France in the ship not having those documents with which in the judgment of the French court the American was bound by treaty to be provided? I do not say that they have construed the treaty rightly; on the contrary, suppose them to have construed it ever so iniquitously; yet, having competent jurisdiction to construe the treaty, and having professed to do so, we [the court] are bound by that comity of nations which has always prevailed amongst civilized states to give credit to their adjudication when the same question arises here upon which the foreign court has decided. After arguing for hours, we must come to the same conclusion at last, that the French court has specifically condemned the vessel for an infraction of treaty which negatives the warranty of neutrality. Then, having distinctly adjudged the vessel to be good prize upon a ground within their jurisdiction, unless we deny their jurisdiction, we are bound to abide by that judgment. Whenever a case occurs of a condemnation by a foreign court on the ground of *ex parte* ordinances only, without drawing inferences from them to show an infraction of treaty between the nation of the captors and captured, and referring the judgment of the court to the breach of treaty, I shall be glad to hear the case argued, whether such ordinances are to be considered as furnishing rules of presumption only against the neutrality or as positive laws in themselves, binding other nations *proprio vigore*."

The decision of the English court, then, goes to this extent, that in an action between individuals, the decree of the French court which had jurisdiction is final; so would it also be final as to the vessel, and the purchaser at the confiscation sale could rest upon the decree as good title against all the world.

But all this does not affect the position of the United States Government against the government of France.

Lord Ellenborough says that no matter how iniquitous the construction given the treaty by the French court, he, as a judge, is bound to follow it. But so is not the Government of the United States. That Government could have objected that either the court was corrupt, or that there existed no treaty, or that there had been manifest error in construing it. All such questions may be outside the right of a court to consider, but they are within the right and form part of the duty of the political branch of the Government. If the French court, acting within its jurisdiction, construed the treaty iniquitously, the courts might not have power to remedy the wrong, but the

owner had a right to appeal to his Government for redress, and that Government, when convinced of the justice of his complaint, was bound to endeavor to redress it.

The decree is an estoppel on the courts, but it is no estoppel on the Government; in fact, the right to diplomatic interference arises only after the decree is rendered. Of course, precedents for cases of this kind are not to be found in the reports of courts, for no such case can, in the nature of things, come before a court unless by virtue of a special and peculiar statute, such as that under which we now act; but diplomatic history is full of them.

Rutherford (Institutes, vol. 2, ch. 9, p. 19), speaking of the right of a state to proceed in prize, says:

“This right of the state to which the captors belong to judge exclusively is not a complete jurisdiction. The captors, who are its own members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has a complete jurisdiction over their persons. But the other parties in the controversy, as they are members of another state, are only bound to submit to its sentence as far as this sentence is agreeable to the law of nations, or to particular treaties, because it has no jurisdiction over them in respect either of their persons or of the things that are the subject of the controversy. If justice, therefore, is not done them, they may apply to their own state for a remedy; which may, consistently with the law of nations give them a remedy either by solemn war or by reprisals. (See Dana's, Wheaton, 391.)”

This brings us naturally to another point, admitted as a general principle, that appeal should be prosecuted to the court of last resort before there can be diplomatic intervention.

The exceedingly able British-American Commission which sat in Washington in 1872 not only unanimously decided that they had jurisdiction in prize cases in which the decision of the ultimate appellate tribunal of the United States had been had, a conclusion in which even the agent of the United States concurred, but also that they had jurisdiction when the claimant had not pursued his remedy to the court of last resort, provided satisfactory reasons were given for the failure to appeal. (Papers relating to the Treaty of Washington, vol. 6, pp. 88-90.) To this last conclusion the American Commissioner dissented; but even he held that a misfeasance or default of the capturing Government, by which means an appeal was prevented, was sufficient to excuse the failure to appeal. (Id., 92.)

The rights of the prize courts are the rights of the capturing state. These courts are its agents, deputed by it to examine into the conduct of its own subjects before becoming answerable for what they have done, and the right ends when their conduct has been thoroughly examined. Therefore the state has a right to require that the captor's acts be examined in all the ways which it has appointed for this purpose, and on this principle is founded the doctrine that the complainant, unless he exhaust his appeal, shall be held to confess the justice of the decision. This pre-supposes, first, that there are appellate courts; second, that they are open to the complainant freely and honestly. The captor has no right to insist for his own protection upon the fulfilment of a form which he by his own acts prevents.

There is also a distinction, not often clearly drawn, between the validity of a claim *per se* and the right to enforcement. The justice of the claim is founded upon the injustice of the sentence. The appeal does not affect the merits of the claim; it does not palliate or destroy any wrong done; but it is simply a course provided for the captor's protection, that he may fully examine into the acts of his own agents, through his other agents, the courts.

"The whole proceeding, from the capture to the condemnation, is a compulsory proceeding *in invitum* by the state in its political capacity, in the exercise of war powers, for which it is responsible, as a body politic, to the state of which the owner of the property is a citizen." (Dana's Wheaton, note 186.)

Therefore the capturing state may waive such demand, and not insist upon exhausting its right to further investigation, and may waive it by failing to provide an appellate tribunal, or by preventing recourse to it, or in any other way which shows an intention not to insist upon this right of examination; but appeal or no appeal, the validity of the claim is founded upon the injustice to the claimants.

All writers lay down the principle that appeal should be taken from the inferior to the superior tribunal before resort by the injured Government to measures of redress; but this principle is always coupled with the extreme measures of war and reprisals (see Rutherford, *supra*; Grotius, bk. 3, ch. 2, §§ 4, 5), and there is no assertion in the writers that illegal capture necessarily does not found an international claim even when appeal has not been taken.

It was notorious that justice could not be obtained in the

French prize tribunals in existence at the time of those seizures. . . . Consuls were at one time forbidden to appear before the tribunals in defense of absent owners. . . . The form and expense of appeal were useless, for it was not denied that the adjudications below were in accordance with French ordinances, while it was contended that they were in violation of the rights of neutrals, measured either by treaty provision or by the precepts of the law of nations. Municipal law is not a measure of international responsibility, but it is binding within the jurisdiction of the state upon all its subordinate agents, including the courts. The decree in one of the cases before us, which was appealed to the civil tribunal, shows . . . that questions of treaty or international law were not ruled upon, the court being guided alone by the statutes of France. In the face of precedents of this kind an appeal was a vain and expensive form, as an affirmation of the judgment below necessarily must follow.

It is important to note that during the period of these seizures neither the Government of the United States, which consistently supported the claimants' contentions, nor the Government of France, from whom we were demanding redress, indicated the necessity of the form of appeal, nor later did the French, even in the long negotiations in which the validity of these claims was a principal subject of discussion, intimate in any way that they considered the appeal of importance or that they required it.

We conclude, therefore, that under these exceptional circumstances a claim properly founded in law is not excluded from our jurisdiction because the supposed remedy by appeal was not exhausted, and this we hold upon two principal grounds: First that by the action of the French Government such an appeal was useless or impracticable; second, that as between the United States and France such an appeal as a condition precedent to recovery was in effect waived. . . .

THE ROUMANIAN.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1915.
Law Reports [1916] 1 A. C. 124.

[The statement of facts and the first part of the opinion are printed *ante*, 556.]

LORD PARKER OF WADDINGTON. . . . The next point to be considered is the jurisdiction of the Prize Court so far as the petroleum in question was, when seized as prize, warehoused in the tanks of the British Petroleum Company, Limited, and no longer on board the Roumanian. The appellants contended that it is the local situation of the goods seized as prize which determines the jurisdiction of the Prize Court. If such goods be, at the time of seizure, on land and not afloat, it is not, they contended, the Prize Court but some Court of common law which has jurisdiction to determine the rights of all parties interested. In their Lordships' opinion, this contention also fails. The chief function of a Court of Prize is to determine the question, "prize or no prize," in other words, whether the goods seized as prize were lawfully so seized, so as to raise a title in the Crown. In determining this question the local situation of the goods at the time of seizure may be of importance, but it is the seizure as prize and not the local situation of the goods seized which confers jurisdiction. If authority be needed for this proposition, it may be found in Lord Mansfield's judgment in the case of *Lindo v. Rodney*, reported in a note to *Le Caux v. Eden*, 2 Doug. 594, at p. 612, n. It must be remembered that the jurisdiction of the Prize Court is based in every case upon a commission under the Great Seal. Lord Mansfield pointed out that in the case before him the commission under which the Court derived jurisdiction conferred jurisdiction in all cases of prize whether the goods sought to be condemned were taken on land or afloat. The same may be said of the commission in the present case. In his opinion, however, it was necessary to draw a distinction in this connection between the jurisdiction of the Court of Admiralty as a Court of Prize and its jurisdiction apart from the commission which constitutes it a Court of Prize. To give the Court of Admiralty, as such, jurisdiction the matter complained of must have occurred on the high seas, but in all matters of prize it was not the Court of Admiralty as such, but the Court of Admiralty by

virtue of the commission which had jurisdiction, and this jurisdiction was exclusive, whether the goods seized as prize were on land or afloat. The only authority which, at first sight, appears to be in conflict with Lord Mansfield's decision is the case of *The Ooster Eems*, 1 C. Rob. 284, n., to which, for the reasons hereinafter mentioned, no great weight can be given.

Their Lordships will now proceed to consider the appellants' contention that even if the Prize Court had jurisdiction it ought nevertheless to have decided against the condemnation of the petroleum in question so far as it was not actually afloat on board the Roumanian at the time of seizure. They admitted that during the war no order for restitution or release could properly be made in favor of the German owners, but they suggested that the proper course was to haul the petroleum over to the Public Trustee or some other official for safe custody until the restoration of peace. No case where any such course has been pursued was cited.

The real question is whether the petroleum in question is, according to the law administered by Prize Courts in this country, properly the subject of maritime prize, although locally situated on shore. All enemy ships and cargoes which may, after the outbreak of the war, be found afloat on the high seas or in territorial waters or in the ports or harbours of the realm are liable to seizure as maritime prize. The petroleum in question was undoubtedly enemy property. It was undoubtedly on the high seas at and after the declaration of war. It became liable to seizure as prize as soon as war was declared. It did not cease to be so liable by being carried into Dartmouth or thence to Purfleet. It clearly remained so liable while still afloat. Did it cease to be so liable when pumped into the tanks of the British Petroleum Company, Limited? In the course of the argument counsel were asked to suggest some intelligible reason why it should cease to be so liable. No satisfactory reason was suggested, and their Lordships have been unable to discover one for themselves. The argument of counsel was based on the assumption that no enemy goods not actually afloat at the time of seizure could be lawfully seized as prize, unless possibly they could be considered as locally situate within a port or harbour, and that the tanks of the British Petroleum Company, Limited, could not be considered as part of the Port of London. There is, in their Lordships' opinion, no ground for this assumption. The test of afloat or ashore is no infallible test as to whether goods can or cannot be

lawfully seized as maritime prize. It is perfectly clear, for instance, that enemy goods seized on enemy territory by the naval forces of the Crown may lawfully be condemned as prize. The same is true of goods seized by persons holding letters of marque, and even of goods seized by persons having no authority whatever on behalf of the Crown, when the Crown subsequently ratifies the seizure. This is clear from the case of *Brown and Burton v. Franklyn* (1705), Carth. 474, quoted in Lord Mansfield's judgment above referred to. *Brown and Burton*, the masters of a vessel belonging to the East India Company, seized enemy goods on land. They had no letters of marque. The King's Proctor instituted proceedings in the Prize Court, and having obtained a condemnation of the property as prize proceeded against *Brown and Burton* for an account. The latter instituted proceedings at common law for a prohibition on the ground that the goods taken were on land, but relief was refused. Moreover, Lord Mansfield, in *Lindo v. Rodney*, 2 Doug. 612, expressly approves an admission made by counsel in that case to the effect that it would be "spinning very nicely" to contend that, if the enemy left their ship and got on shore with money and were followed on land and stripped of their money, this would not be a lawful maritime prize. If this be, as it seems to their Lordships to be, good law, the present is an *a fortiori* case. In the case put by counsel the landing of the goods was made by the enemy with the object of escaping capture afloat. In the present case the landing was by British subjects who had the enemy goods in their possession and did not know what else to do with them, and were pursuing a course recommended by the Board of Trade and in no way intended to prejudice the Crown's rights. . . .

Their Lordships, therefore, have come to the conclusion that the petroleum on board the Roumanian, having from the time of the declaration of the war onwards been liable to seizure as prize, did not cease to be so liable merely because the owners of the vessel, not being able to fulfil their contract for delivery at Hamburg, pumped it into the tanks of the British Petroleum Company, Limited, for safe custody, and that therefore its seizure as prize was lawful. They see no reason to dissent from the judgment of the President to the effect that these tanks constituted part of the Port of London for the purpose of applying the rule relating to the liability to seizure of enemy's goods in

the ports and harbours of the realm, but it is unnecessary to decide this point.

For the reasons hereinbefore appearing their Lordships are of opinion that the appeal should be dismissed, and they will humbly advise His Majesty accordingly.

THE ZAMORA.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1916.
Law Reports [1916] 2 A. C. 77.

On appeal from the High Court of Justice, Probate, Divorce and Admiralty Division, in Prize.

LORD PARKER OF WADDINGTON. On April 8, 1915, the *Zamora*, a Swedish steamship bound from New York to Stockholm with a cargo of grain and copper, was stopped by one of His Majesty's cruisers between the Faroe and Shetland Islands and taken for purposes of search first to the Orkney Islands and then to Barrow-in-Furness. She was seized as prize in the latter port on April 19, 1915, and in due course placed in the custody of the marshal of the Prize Court. . . . On May 14, 1915, a writ was issued by His Majesty's Procurator-General claiming confiscation of both vessel and cargo, and on June 14, 1915, the President [of the Prize Court], at the instance of the Procurator-General, made an order under Order XXIX., r. 1, of the Prize Court Rules giving leave to the War Department to requisition the copper, but subject to an undertaking being given in accordance with the provisions of order XXIX., r. 5.¹ This appeal is from the President's order of June 14, 1915. . . .

¹ The provisions of the Orders in Council essential to the decision of this case are as follows:

Order I . . . "2 . . . The term 'ship' when used in these Rules shall also mean 'goods' and 'freight.'"

Order XXIX [as amended by Order of Council of April 29, 1915]:

"1. Where it is made to appear to the Judge on the application of the proper Officers of the Crown that it is desired to requisition on behalf of His Majesty a Ship in respect of which no final decree of condemnation has been made, he shall order that the Ship shall be appraised, and that upon an undertaking being given in accordance with Rule 5 of this Order [providing for payment for ship or goods taken] the Ship shall be released and delivered to the Crown."—Ed.

The Prize Court Rules derive their force from Orders of His Majesty in Council. These Orders are expressed to be made under the powers vested in His Majesty by virtue of the Prize Court Act, 1894 [57 & 58 Vict. c. 39], *or otherwise*. The Act of 1894 confers on the King in Council power to make rules as to the procedure and practice of the Prize Courts. So far, therefore, as the Prize Court Rules relate to procedure and practice they have statutory force and are, undoubtedly, binding. But Order XXIX., r. 1, construed as an imperative direction to the judge is not merely a rule of procedure or practice. . . . If, therefore, Order XXIX., rule 1, construed as an imperative direction be binding, it must be by virtue of some power vested in the King in Council otherwise than by virtue of the Act of 1894. It was contended by the Attorney-General that the King in Council has such a power by virtue of the Royal prerogative, and their Lordships will proceed to consider this contention.

The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity. It is, however, suggested that the manner in which Prize Courts in this country are appointed and the nature of their jurisdiction differentiate them in this respect from other Courts.

Prior to the Naval Prize Act, 1864 [27 & 28 Vict. c. 25], jurisdiction in matters of prize was exercised by the High Court of Admiralty, by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war. The commission no doubt owed its validity to the prerogative, but it cannot on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the jurisdiction thereby conferred. The Courts of Common Law and Equity in like manner originated in an exercise of the prerogative. The form of commission conferring jurisdiction in prize on the Court of Admiralty was always substantially the same. Their Lordships will take that

quoted by Lord Mansfield in *Lindo v. Rodney* (1782), 2 Doug. 612, n., 614, n., as an example. It required and authorized the Court of Admiralty "to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods, that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty, and the law of nations." If these words be considered, there appear to be two points requiring notice, and each of them, so far from suggesting any reason why the prerogative should extend to prescribing or altering the law to be administered by a Court of Prize, suggests strong grounds why it should not.

In the first place, all those matters upon which the Court is authorized to proceed are, or arise out of, acts done by the sovereign power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a Court his position is in fact the same as in the ordinary Courts of the realm upon a petition of right which has been duly filed. Rights based on sovereignty are waived and the Crown for most purposes accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

In the second place, the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations—in other words, international law. Of course, the Prize Court is a municipal Court, and its decrees and orders owe their validity to municipal law. The law which it enforces may therefore, in one sense, be considered a branch of municipal law. Nevertheless, this distinction between municipal and international law is well defined. A Court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It need inquire only what that law is, but a Court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilized nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King in Council purporting to prescribe or alter the international law, it is administering not international law

but municipal law; for an exercise of the prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject. If an Order in Council were binding on the Prize Court, such Court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.

There is yet another consideration which points to the same conclusion. The acts of a belligerent Power in right of war are not justiciable in its own Courts unless such Power, as a matter of grace, submit to their jurisdiction. Still less are such acts justiciable in the Courts of any other Power. As is said by Story J. in the case of *The Invincible* [1814], 2 Gall. 28, 44, "the acts done under the authority of one Sovereign can never be subject to the revision of the tribunals of another Sovereign; and the parties to such acts are not responsible therefor in their private capacities." It follows that but for the existence of Courts of Prize no one aggrieved by the acts of a belligerent Power in times of war could obtain redress otherwise than through diplomatic channels and at the risk of disturbing international amity. An appropriate remedy is, however, provided by the fact that, according to international law, every belligerent Power must appoint and submit to the jurisdiction of a Prize Court to which any person aggrieved by its acts has access, and which administers international as opposed to municipal law—a law which is theoretically the same, whether the Court which administers it is constituted under the municipal law of the belligerent Power or of the Sovereign of the person aggrieved, and is equally binding on both parties to the litigation. It has long been well settled by diplomatic usage that, in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent Power cognisable in a Court of Prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the Prize Courts of the belligerent Power. A case for such intervention arises only if the decisions of those Courts are such as to amount to a gross miscarriage of justice. It is obvious, however, that the reason for this rule of diplomacy would entirely vanish if a Court of Prize, while nominally administering a law of international obligation, were in reality acting under the direction of the Executive of the belligerent Power.

It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be

bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the international law, the authority of the Court as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations, or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the executive orders of the King in Council.

In connection with the foregoing considerations, their Lordships attach considerable importance to the Report dated January 18, 1753, of the Committee appointed by His Britannic Majesty to reply to the complaint of Frederick II. of Prussia as to certain captures of Prussian vessels made by British ships during the war with France and Spain, which broke out in 1744. By way of reprisals for these captures the Prussian King had suspended the payment of interest on the Silesian Loan. The Report, which derives additional authority from the fact that it was signed by Mr. William Murray, then Solicitor-General, afterwards Lord Mansfield, contains a valuable statement as to the law administered by Courts of Prize. This is stated to be the law of nations, modified in some cases by particular treaties. "If," says the Report, "a subject of the King of Prussia is injured by, or has a demand upon any person here, he ought to apply to your Majesty's Courts of justice, which are equally open and indifferent to foreigner or native; so, vice versa, if a subject here is wronged by a person living in the dominions of His Prussian Majesty, he ought to apply for redress in the King of Prussia's Courts of justice. If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the jurisdictions established to try these questions. The law of nations, founded upon justice, equity, conscience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the State, and justice absolutely denied *in re minime dubia* by all the tribunals, and afterwards

by the Prince. Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is, that justice should be impartially administered to him, as it is to the subjects of that Prince in whose Courts the matter is tried." The Report further points out that in England "the Crown never interferes with the course of justice. No order or any intimation is ever given to any judge." It also contains the following statement: "All captures at sea, as prize, in time of war, must be judged of in a Court of Admiralty, according to the law of nations and particular treaties, where there are any. There never existed a case where a Court, judging according to the laws of England only, ever took cognizance of prize . . . it never was imagined that the property of a foreign subject, taken as prize on the high seas, could be affected by laws peculiar to England." See *Collectanea Juridica*, vol. 1, pp. 138, 147, 152. This Report is, in their Lordships' opinion, conclusive that in 1753 any notion of a Prize Court being bound by the executive orders of the Crown, or having to administer municipal as opposed to international law, was contrary to the best legal opinion of the day.

The Attorney-General was unable to cite any case in which an Order of the King in Council had as to matters of law been held to be binding on a Court of Prize. He relied chiefly on the judgment of Lord Stowell in the case of *The Fox* [1811], Edw. 311; 2 Eng. P. C. 61. The actual decision in this case was to the effect that there was nothing inconsistent with the law of nations in certain Orders in Council made by way of reprisals for the Berlin and Milan Decrees, though if there had been no case for reprisals the Orders would not have been justified by international law. . . . The judgment of Lord Stowell contains, however, a remarkable passage quoted in full in the Court below, which refers to the King in Council possessing "legislative rights" over a Court of Prize analogous to those possessed by Parliament over the Courts of common law. At most this amounts to a dictum, and in their Lordship's opinion, with all due respect to so great an authority, the dictum is erroneous. It is, in fact, quite irreconcilable with the principles enunciated by Lord Stowell himself. . . . [The learned judge here quotes from *The Maria*, 1 C. Robinson, 340, 350.]

There are two further points requiring notice in this part of

the case. The first arises on the argument addressed to the Board by the Solicitor-General. It may be, he said, that the Court would not be bound by an Order in Council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and, when this is so, it would not be unreasonable to hold that the Court should subordinate its own opinion to the directions of the Executive. This argument is open to the same objection as the argument of the Attorney-General. If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is, according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfill its functions as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions.

The second point requiring notice is this. It does not follow that, because Orders in Council cannot prescribe or alter the law to be administered by the Prize Court, such Court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be. . . . Further, the Prize Court will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such Order short of treating it as an authoritative and binding declaration of law. . . . Further, it cannot be assumed, until there be a decision of the Prize Court to that effect, that any executive order is contrary to law, and all such orders, if acquiesced in and not declared to be illegal, will, in course of time, be themselves evidence by which international law and usage may be established. . . .

On this part of the case, therefore, their Lordships hold that Order XXIX., r. 1, of the Prize Court Rules, construed as an imperative direction to the Court, is not binding. . . . Their Lordships will humbly advise His Majesty accordingly. . . .

NOTE.—In Great Britain the Admiralty Division of the High Court of Justice is vested with jurisdiction over all matters of prize arising on the high seas, or in any part of the British dominions or in any place where the Crown has jurisdiction. In the British posses-

sions, prize jurisdiction is vested either in the Colonial Courts of Admiralty or in a Vice-Admiralty Court. Such jurisdiction is not inherent, but is derived from a special commission of the Crown or warrant of the Admiralty authorizing the court to act as a prize court. An appeal lies from all the prize courts to the Judicial Committee of the Privy Council. For an interesting account of British prize jurisdiction see the address of the Attorney General at the opening session of the British Prize Court on September 4, 1914, best reported in 1 *British and Colonial Prize Cases*, 2.

In the United States, prize jurisdiction is vested in the District Courts without special commission. An appeal lies to the Supreme Court. The court of that district into which the captured property is first taken has jurisdiction without regard to the place of capture, *The Prize Cases* (1863), 2 Black, 635. In both Great Britain and the United States the prize courts are true judicial tribunals and are always composed of judges. In other countries the court is often composed in whole or in part of administrative officials without judicial training. In Germany only two of the five judges are lawyers. The Russian prize courts are largely composed of naval officers. One of the most important conventions adopted at The Hague in 1907 provided for the establishment of an international prize court to which an appeal would lie from the municipal prize courts. It was to provide a code of maritime law for the use of the proposed court that the Naval Conference was assembled in 1908-1909 which prepared the Declaration of London. On the international prize court and the Declaration of London see Bentwich, *The Declaration of London*; Hershey, *Essentials*, 524; Higgins, *The Hague Peace Conferences*, ch. xii; Holland, *War and Neutrality*, 150; Hull, *The Two Hague Conferences*, 427; *Int. Law Topics*, 1909; *Ib.*, 1915, 93; Scott, *The Hague Peace Conferences of 1899 and 1907*, I, ch. x; C. N. Gregory, "The Proposed International Prize Court and Some of its Difficulties," *Am. Jour. Int. Law*, II, 458; H. B. Brown, "The Proposed International Prize Court," *Ib.* II, 476; C. H. Stockton, "The International Naval Conference of London, 1908-1909," *Ib.* III, 596; papers on the Declaration of London by Arthur Cohen, K. C., Sir John Macdonnell and Dr. Thomas Baty in *Report of the 26th Conference of the International Law Association*, 67, 89, 115. The Declaration of London was never put into effect.

Prize, as defined by Lord Mersey, is the term applied to a ship or goods captured *jure belli* by the maritime force of a belligerent at sea or seized in port. Earl of Halsbury, *The Laws of England*, XXIII, 276. This definition, by one of the most eminent authorities on admiralty law, is not sufficiently comprehensive to include a number of decided cases. In *The Roumanian* (1914), L. R. [1915] P. 26, the British Prize Court held that a cargo of oil belonging to a German company which had been shipped before the outbreak of war on a British tank-steamer bound from Port Arthur, Texas, to Hamburg, but diverted by the Admiralty to a British port where a part of it had been pumped into tanks on land and afterward seized as prize, was subject to maritime capture. "It came into the port," said Sir

Samuel Evans, "as maritime merchandise of the enemy subject to seizure, and in my opinion the whole of it remained such, until it was actually formally seized on behalf of the Crown." And the learned President indicated that his decision would be the same whether the tanks were within the port or not.

In an excellent discussion of the subject in *Ten Bales of Silk at Port Said* (Egypt, 1916), 2 Br. & Col. P. C. 247, President Cator formulated the governing principle in these words:

In examining the cases and pondering upon the principles which determine whether goods are capable of being made prize or not, it has been borne in upon me that the determining factor is not whether the goods are referable to any particular ship, or whether they came into the country stamped with a hostile character, but whether, when the Crown lays its hands upon them, they are cargo or not cargo.

President Cator's principle of "cargo or not cargo" was applied in the *Achaia* (No. 2) (Egypt, 1915), 1 Br. & Col. P. C. 635, and the decision in *The Eden Hall* (1916), 2 Ib. 84, might also have been based upon it. In *The Thalia* (1905), Takahashi, 605, the Prize Court of Japan held that a Russian vessel which had been loaded upon another vessel and conveyed before the outbreak of war to a ship yard in Japan and placed on dry land for repairs was because of its nature a maritime prize subject to seizure and condemnation. Naval stores captured at a naval station by a naval force and as a result of a naval engagement are subject of prize, but barges propelled by sweeps and polls, and non-seagoing floating derricks or wrecking boats are not. *The Manila Prize Cases* (1903), 188 U. S. 254. A launch and sixteen lighters which, upon the approach of the British forces to certain ports in German Southwest Africa, has been loaded by the German naval commander upon railway cars and shipped to points 148 and 310 miles inland, where they were captured by the British six months later, were not a subject of maritime prize. *The Anichab* (1921), L. R. [1922] 1 A. C. 235. A Belgian yacht which was in the harbor of Antwerp when the city was captured by the Germans and which was seized by the commander of the port was condemned on the ground that seizures by troops or port authorities are within prize jurisdiction. *The Primavera* (Germany, 1916), *Entscheidungen*, 194. Captures made on inland lakes which have no outlet to the sea are subject to the law of prize. In the *Matter of Certain Craft Captured on the Victoria Nyanza* (1918), L. R. [1919] P. 83. It also applies to vessels seized while at anchor in inland rivers. *The Cernignano* (Italy, 1917), *Gazzetta Ufficiale*, April 23, 1917. In the American Civil War captures made upon inland waters by the naval forces of the United States were by statute exempt from condemnation as maritime prize. *The Cotton Plant* (1871), 10 Wallace, 577.

In *The Antares* (1915), 1 Br. & Col. P. C. 261, 271, Sir Samuel Evans said:

It is the theory of the old Prize Courts, and I think it is a

very sound one, that the Crown themselves capture or seize a vessel, and the persons whose property is seized must come in the course of proceedings prepared to give grounds why their property is not confiscable. It is enough for the Crown to say, "We regard this vessel or this cargo as prize and we seize it as prize, and we issue a writ against you in which we tell you that we are going to ask the Court for its condemnation." Thereupon the other parties must file their claim, and it is for them to show that the seizure and capture by the Crown were not rightfully made.

Prize courts are courts of international law,—“that is,” in the words of Sir Samuel Evans, “the law which is generally understood and acknowledged to be the existing law applicable between nations by the general body of enlightened legal opinion,” *The Odessa* (1914), L. R. [1915] P. 52. Hence when a neutral claimant declared that the statutes of his country forbade his presenting the evidence which the court required, Lord Parker of Waddington, in *The Consul Corfitzon* (1917), L. R. [1917] A. C. 550, replied:

Their Lordships are clearly of opinion that a Court of Prize cannot properly be deterred from making what it conceives to be the appropriate order because a neutral claimant would, if he obeyed the order, be guilty of a breach of his own municipal law. The substantive law administered by the Court is international law, which cannot be affected by the municipal legislation of any one State, and its practice and procedure are governed by the municipal law of the State from which it derives its jurisdiction, and cannot be modified by the municipal legislation of any other State.

If however a country enacts legislation which conflicts with the established rules of international law, such legislation is binding upon its prize courts, *The Eir* (France, 1916), *Journal Officiel*, August 17, 1916; *The Prins Hendrick* (Germany 1917), *Entscheidungen*, 321.

The determination of questions of prize belongs exclusively to the country of the captor, *L'Invincible* (1816), 1 Wheaton, 238. The prize court of an ally has no jurisdiction, *Glass v. Sloop Betsey* (1794), 3 Dallas, 6, but a prize court in the territory of an ally may condemn, *The Christopher* (1799), 2 C. Robinson, 209. A belligerent may not set up a prize court in a neutral country, *Wheelwright v. De Peyster* (1806), 1 Johnson (N. Y.) 471, 481. There are exceptional cases in which a prize court sitting in a belligerent state has condemned a prize lying in a neutral port, *The Henrick and Maria* (1799), 4 C. Robinson, 43; *Hudson v. Guestier* (1808), 4 Cranch, 293; *The Polka* (1854), Spinks, 57; but in the opinion which he delivered in the last case the eminent judge Dr. Lushington said that “this case is decided upon its own peculiar circumstances, and is not to be considered as a precedent for the condemnation of a prize while lying in a neutral port.” To ask a neutral to allow its ports to be used as places of deposit for captured vessels which cannot be taken to

a port of the captor is to ask it to abandon its neutrality. The doctrine of the cases cited above is now generally condemned. It was embodied in article 23 of Convention XIII, adopted at The Hague in 1907, but this article was rejected by Great Britain, Japan, Siam and the United States.

A prize court not only has exclusive jurisdiction of all questions of prize or no prize but also of all the incidents which depend for their determination on the question of prize or no prize. Hence an action for false imprisonment based on the detention of a passenger on a vessel which it was alleged had been wrongfully captured could not be heard by a common law court, for the question of the validity of the capture could only be determined by a prize court, *Le Caux v. Eden* (1781), 2 Douglas, 594. So when a voyage was interrupted by capture and was continued to a different port determined by the captors, a claim for freight could only be heard by a prize court, since the right to the freight contracted for at the beginning of the voyage was lost by the interruption of the voyage and the only freight recoverable would be that which the prize court might award, *The Corsican Prince* (1915), L. R. [1916] P. 195; *The St. Helena* (1916), L. R. [1916] 2 A. C. 625. But when goods have been effectively released to a claimant, no question involving the *jus belli* remains for determination and the jurisdiction of the prize court comes to an end, *Egyptian Bonded Warehouses Co. Ltd. v. Yeyasu Goshi Kaisha* (1921), L. R. [1922] 1 A. C. 111. For further discussion of the incidental jurisdiction of prize courts see *The Anna Christiana* (1778), Hay and Marriott, 161; *Smart v. Wolf* (1789), 3 T. R. 323; *The Copenhagen* (1799), 1 C. Robinson, 289; *The Race Horse* (1800), 3 Ib. 101; *The Diana* (1803), 5 Ib. 60; *Faith v. Pearson* (1815), 4 Campbell, 357; *The Antonia Johanna* (1816), 1 Wheaton, 159; *The Nassau* (1867), 4 Wallace, 634.

The capture of a vessel or cargo does not transfer title. That can be effected only by a decree of a prize court of competent jurisdiction, *The Nassau* (1867), 4 Wallace, 634; *Oakes v. United States* (1899), 174 U. S. 778, 789; *The Brig Fair Columbian* (1913), 49 Ct. Cl. 133. Pending condemnation or restitution the captured property or its proceeds are held by the captor in trust for those who may finally be proved to be entitled to it, *The Nassau* (1867), 4 Wallace, 634, but a decree of condemnation relates back to the time of capture, *Goss v. Withers* (1758), 2 Burrow, 683; *Stevens v. Bagwell* (1808), 15 Ves. Jr. 139. As seizure is merely the assertion of a right to capture, it is the captor's duty to take his prize before a prize court as soon as possible. Unnecessary delay may result in a decree of demurrage by way of damages, *The Corier Maritimo* (1799), 1 C. Robinson, 287; *The Peacock* (1802), 4 Ib. 185; *Slocum v. Mayberry* (1817), 2 Wheaton, 1; *The Nuestra Senora de Regla* (1882), 108 U. S. 92. A delay of one month was held to be unreasonable in *The St. Juan Baptista* (1803), 5 C. Robinson, 33. A claimant also may lose his rights by undue delay, *The Susanna* (1805), 6 Ib. 48. While it is the duty of a captor to take in his prize for adjudication, he may under imperative circumstances sell it and submit the proceeds to the prize court, *Jecker*

v. Montgomery (1852), 13 Howard, 498, 516. In *The Erymanthos*, Cargo Ex. (Malta, 1915), the court held that if enemy property consigned to a British, allied, or neutral subject under a contract by which title had passed to the buyer be captured before payment, payment is to be made to the Crown, on the theory that the goods when restored are put in their original condition as to the seller's lien, and the seller being an enemy, his rights pass to the Crown. *Jour. Soc. Comp. Leg.*, XVI, (N. S.) 70.

In extreme cases enemy vessels captured as prize may be destroyed. *The Felicity* (1819), 2 Dodson, 381, but if the vessel proves not to have been an enemy vessel, the captors must pay the full value of the property destroyed even though if brought before a prize court it would have been confiscated. *The Actæon* (1815), 2 Dodson, 48. But recent regulations as to destruction of prizes issued by various governments do not distinguish between enemy and neutral vessels. See Wilson, *Handbook*, 306; *Int. Law Topics*, 1905, 62; *Int. Law Situations*, 1907, 74; *Ib.*, 1911, 51; Atherley-Jones, 528; Barclay, *Problems*, 99; Lawrence, *War and Neutrality in the Far East*, 250; Garner, ch. xv; Smith and Sibley, *International Law*, ch. xii. Whenever a captor brings goods to the port of actual destination according to the intent of the contracting parties he is entitled to the freight because he has complied with the terms of the contract, but in any other case he is entitled to no freight at all, even though the vessel has performed a large part of its voyage. In *The Vrow Henrica* (1803), 4 C. Robinson, 343, Lord Stowell said, "Freight is, in all ordinary cases, a lien which is to take the place of all others. The captor takes *cum onere*." See also *The Der Mohr* (1800), 3 C. Robinson, 129, (1802), 4 *Ib.* 315; *The Fortuna* (1802), 4 *Ib.* 278; *The Vrow Anna Catherina* (1806), 6 *Ib.* 269; *The Antonia Johanna* (1816), 1 Wheaton, 159; *Hooper, Adm. v. United States* (1837), 22 Ct. Cl. 408; *The Roland* (1915), 1 Br. & Col. P. C. 188. The title to all property captured vests in the state of the captor, *The Manila Prize Cases* (1903), 188 U. S. 254, and hence at any time prior to condemnation the state may order the property released to its former owner, *The Elsebe* (1804), 5 C. Robinson, 155; *The St. Ivan* (1811), Edwards, 376. But such release does not prevent the captor from proceeding to adjudication, *The Mercurius* (1798), 1 C. Robinson, 80. The sentence of condemnation by a prize court having jurisdiction completely extinguishes the title of the original proprietor and transfers title to the state or sovereign of the captor, *The Brig Fair Columbian* (1913), 49 Ct. Cl. 133. Since the judgment of a prize court is a proceeding *in rem* it is conclusive as to all matters decided and within its jurisdiction, and is a protection to all persons who derive their claims from the captor, *Hudson v. Guestier* (1810), 6 Cranch, 281; *Cushing v. Laird* (1832), 107 U. S. 69, but a decree may be made the basis of a diplomatic protest, *Cushing v. United States* (1886), 22 Ct. Cl. 1, 42. See the classic argument of William Pinckney in Moore, *Int. Arb.*, III, 3180. The following decisions in prize made by the United States Supreme Court during the Civil War were modified or reversed by the British-American Claims Commission appointed under the

Treaty of Washington (the reference in parentheses is to Moore, *Int. Arb.*): *The Hiawatha*, 2 Black, 635 (IV, 3902); *The Circassian*, 2 Wallace, 135 (IV, 3911); *The Springbok*, 5 Wallace, 1 (IV, 3928); *Sir William Peel*, 5 Wallace, 517 (IV, 3935); *The Volant*, 5 Wallace, 179 (IV, 3950); *The Science*, 5 Wallace, 178 (IV, 3950). For further discussion of prize courts and prize law, see Earl of Halsbury, *Laws of England*, "Prize Law and Jurisdiction," XXIII, 275; Allin, "English and German Prize Courts and Prize Laws," *Minnesota Law Review*, II, 22; Huberich and King, "Development of German Prize Law," *Columbia Law Review*, XVIII, 503; Sir Erle Richards, "The British Prize Courts and the War," *British Year Book of International Law*, 1920-21, 11; Roscoe, "Prize Court Procedure," *Ib.* 1921-22, 90; Baty, "Prize Droits," *Law Quarterly Review*, XXXII, 38; Viscount Tiverton, *Principles and Practice of Prize Law*; J. A. Hall, *The Law of Naval Warfare*, ch. xi; Pyke, *The Law of Contraband of War*, 214; *Cyclopedia of Law and Procedure*, XL, 372; Cobbett, *Cases and Opinions*, II, 188; Bonfils (Fauchille), sec. 1422; Hyde, II, 786; Moore, *Digest*, VII, ch. XXV.

CHAPTER XVI

UNNEUTRAL SERVICE.

THE IMMANUEL.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1799.
2 C. Robinson, 186.

This was the case of an asserted Hamburg ship, taken 14th August 1799 on a voyage from Hamburg to St. Domingo, having in her voyage touched at Bordeaux, where she sold part of the goods brought from Hamburg, and took a quantity of iron stores and other articles for St. Domingo. A question was first raised as to the property of the ship and cargo; and 2dly, supposing it to be neutral property, Whether a trade from the mother country of France to St. Domingo, a French colony, was not an illegal trade, and such as would render the property of neutrals engaged in it liable to be considered as the property of enemies, and subject to confiscation? . . .

SIR WM. SCOTT [LORD STOWELL] . . .

Upon the mere question of property, as it respects all the goods as well as the ship, I see no reason to entertain a legal doubt. Considering them as neutral property, I shall proceed to the principal question in the case, viz. Whether neutral property engaged in a direct traffic between the enemy and his colonies, is to be considered by this Court as liable to confiscation? And first with respect to the goods.

Upon the breaking out of a war, it is the right of neutrals to carry on their *accustomed* trade, with an exception of the particular cases of a trade to blockaded places, or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search; in which case however they are entitled to freight and expences. I do not mean to say that in the accidents of a war the property of neutrals may not be variously entangled and

endangered; in the nature of human connections it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than fully balanced by the enlargements of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But without reference to accidents of the one kind or other, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title, than by the success of the one belligerent against the other, and at the expence of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking.

What is the colonial trade generally speaking? It is a trade generally shut up to the exclusive use of the mother country, to which the colony belongs, and this to a double use:—that, of supplying a market for the consumption of native commodities, and the other of furnishing to the mother country the peculiar commodities of the colonial regions; to these two purposes of the mother country, the general policy respecting colonies belonging to the states of Europe, has restricted them. With respect to other countries, generally speaking, the colony has no existence; it is possible that indirectly and remotely such colonies may affect the commerce of other countries. The manufactures of Germany may find their way into Jamaica or Guadaloupe, and the sugar of Jamaica or Guadaloupe into the interior parts of Germany, but as to any direct communication or advantage resulting therefrom, Guadaloupe and Jamaica are no more to Germany than if they were settlements in the mountains of the moon; to commercial purposes they are not in the same planet. . . .

Upon the interruption of a war, What are the rights of belligerents and neutrals respectively regarding such places? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea: Such

colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended they must fall to the belligerent of course—and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequence of the mere act of the belligerent; and to say, “True it is, you have, by force of arms forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening, which the prevalence of your arms alone has affected; supplies shall be sent and their products shall be exported; you have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories, and your blood and treasure have been expended, not for your own interest, but for the common benefit of others.”

Upon these grounds, it cannot be contended to be a *right* of neutrals, to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war, it is a measure not of French councils, but of British force.

Upon these and other grounds, which I shall not at present enumerate, an instruction issued at an early period for the purpose of preventing the communication of neutrals with the colonies of the enemy, intended, I presume, to be carried into effect on the same footing, on which the prohibition had been legally enforced in the war of 1756; a period when Mr. Justice Blackstone observes, the decisions on the law of nations proceeding from the Court of Appeals, were known and revered by every state in Europe.

Upon further inquiry it turned out that one favoured nation, the Americans, had in times of peace been permitted, by spe-

cial convention, to exercise a certain very limited commerce with those colonies of the French, and it consisted with justice that that case should be specially provided for; but no justice required that the provision should extend beyond the necessities of that case; whatever goes beyond, is not given to the demands of strict justice, but is matter of relaxation and concession. . . . Upon the whole view of the case as it concerns the goods shipped at Bourdeaux, I am of opinion that they are liable to confiscation. . . .

The only remaining question respects the ship; it belongs to the same proprietors, and if the goods could be considered as properly contraband, would on that account be liable to confiscation, for in the case of clear contraband this is the clear rule: I incline to apply a more favourable one in the present case. It is a case in which a neutral might more easily misapprehend the extent of his own rights, it is a case of less simplicity, and in which he acted without the notice of former decisions upon the subject. The ship came from Hamburg in the commencement of the voyage, she was not picked up for this particular occasion, but was intended to be employed in her owner's general commerce. Attending to these considerations, I shall go no further than to pronounce for a forfeiture of freight and expences, with a restitution of the vessel.

Cargo, taken in at Bordeaux, condemned; ship restored, without freight.

NOTE.—The principle upon which the Rule of 1756 is founded was applied by the Dutch as early as 1604. Being then at war with Spain, they captured a Venetian ship carrying a Spanish license to trade with Spanish colonies south of the equator. As this trade was a Spanish monopoly the acceptance of a license to engage in it was held to amount to such an alliance with Spain as to warrant the condemnation of the ship, Marsden, *Law and Custom of the Sea*, I, 345. While the Rule of 1756 was enforced by British prize courts, it was stoutly opposed on the Continent and in America. For the attitude of the American Government see the letter of April 12, 1805, from Madison, Secretary of State, to Monroe, Minister to England, in Moore, *Digest*, VII, 1105. Madison also made it the subject of a pamphlet entitled *An Examination of the British Doctrine which subjects to Capture a Neutral Trade not Open in Time of Peace*. Madison failed to perceive both the sound logic upon which the Rule is based and the advantage which it might sometime be to America to enforce it. Chancellor Kent was more far seeing. He said:

It is very possible that, if the United States should hereafter attain that elevation of maritime power and influence

which their rapid growth and great resources seem to indicate, and which shall prove sufficient to render it expedient for her maritime enemy (if such an enemy shall ever exist) to open all his domestic trade to enterprising neutrals, we might be induced to feel more sensibly than we have hitherto done the weight of the foreign jurists in favor of the policy and equity of the Rule.

Kent, *Commentaries*, I, 84.

Justice Story thought that the Rule was well-founded (Story, *Life and Letters of Joseph Story*, I, 287), and in this opinion he was followed by Halleck (II, 340). More recently the most eminent American student of sea power has said:

In past days, while reading pretty extensively the arguments *pro* and *con* as to the rights and duties of neutrals in war, it has been impressed upon me that the much-abused Rule of 1756 stood for a principle which was not only strictly just, but wisely expedient.

Mahan, *Some Neglected Aspects of War*, 191.

The more liberal policy pursued by the chief colonial powers in allowing aliens to participate in the trade with their dependencies and particularly Great Britain's acceptance of the Declaration of Paris of 1856, whereby enemy goods under a neutral flag unless contraband, were made exempt from capture, seemed to put the whole question at rest so far as colonial trade is concerned. In the Russo-Japanese War, however, the principle was applied to the case of the American steamer *Mortara*, which was condemned by Japan for engaging in the Russian fur trade from which it was excluded in time of peace, Takahashi, 633. The question was revived by the proposal of the German delegates to the London Naval Conference of 1908 that neutral vessels engaged in a trade closed to them in time of peace should be regarded as enemy vessels. This was strongly opposed. Ultimately the Conference voted (Art. 57) that while the character of a vessel should be determined by the flag which it was entitled to fly, yet "the case in which a neutral vessel is engaged in a trade which is reserved in time of peace remains outside the scope of this rule and is in no way affected by it." This leaves the question open.

Historically the Rule of 1756 is of most interest because of its relation to the rise of the doctrine of continuous voyage. Practically the Rule is now chiefly important in connection with the coasting trade from which foreign vessels are almost everywhere excluded. If a country finding its coast besieged by a hostile fleet should open its coasting trade to neutrals, there can be little doubt that neutral vessels engaging therein would be seized and condemned on the ground that by such participation they identified themselves with the enemy. This is all the more likely in view of the vast extent of the navigation which several powers treat as part of their coasting trade. While not employing the term *cabotage*, France excludes

foreign ships from the service between France and Algiers, and by a system of preferential tariffs accomplishes the same result as to navigation between France and Tunis. Transportation between American ports on the Atlantic and Pacific coasts has always been reserved for American ships, and after the war with Spain navigation between the main land and Porto Rico and Hawaii was declared to be coasting-trade and placed under the same rule. The Merchant Marine Act of 1920 made provision for placing the trade between the United States and the Philippines upon the same basis. Since 1900 Russia has declared all navigation between Vladivostock and any Russian port to be coasting-trade reserved exclusively for Russian vessels. These examples show that there is still abundant reason for maintaining the Rule of 1756.

For further discussion of the subject, see Morison, *Decisions of the Court of Session* (Scotland), 11944-11948; *The America* (1759), Burrell, 210; *Berens v. Rucker* (1761), 1 W. Bl. 313; *The Yong Vrow Adriana* (1764), Burrell, 178; *Brymer v. Atkins* (1789), 1 H. Bl. 165; *The Emanuel* (1799), 1 C. Robinson, 296; *The Princessa* (1799), 2 Ib. 49; *The Jonge Thomas* (1801), 3 Ib. 233n.; *The Anna Catharina* (1802), 4 Ib. 107; *The Rendsborg* (1802), 4 Ib. 121; Bonfils (Fauchille), sec. 1534; Cobbett, *Cases and Opinions*, II, 460; Moore, *Digest*, VII, 383; Wheaton, *Reports of the United States Supreme Court*, I, 507. The best recent discussion of the Rule of 1756 is by A. Pearce Higgins in his *War and the Private Citizen*, ch v.

THE OROZEMBO.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1807.

6 C. Robinson, 430.

This was a case . . . of an American vessel that had been ostensibly chartered by a merchant at Lisbon, "to proceed in ballast to Macao, and there to take a cargo to America," but which had been afterwards, by his directions, fitted up for the reception of three military officers of distinction, and two persons in civil departments in the government of Batavia, who had come from Holland to take their passage to Batavia, under the appointment of the government of Holland. There were also on board a lady, and some persons in the capacity of servants, making in the whole seventeen passengers. . . .

Sir W. SCOTT [LORD STOWELL].—This is the case of an admitted American vessel; but the title to restitution is impugned, on the ground of its having been employed, at the time of the

capture, in the service of the enemy, in transporting military persons first to Macao, and ultimately to Batavia. That a vessel hired by the enemy for the conveyance of military persons, is to be considered as a transport subject to condemnation, has been in a recent case held by this court, and on other occasions. What is the number of military persons that shall constitute such a case, it may be difficult to define. In the former case there were many, in the present there are much fewer in number, but I accede to what has been observed in argument, that number alone is an insignificant circumstance in the considerations, on which the principle of law on this subject is built; since fewer persons of high quality and character may be of more importance, than a much greater number of persons of lower condition. To send out one veteran general of France to take the command of the forces of Batavia, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater; and therefore it is what the belligerent has a stronger right to prevent and punish. In this instance the military persons are three, and there are, besides, two other persons, who were going to be employed in civil capacities in the government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated; but it appears to me on principle, to be but reasonable that, whenever it is of sufficient importance to the enemy, that such persons should be sent out on the public service, at the public expence, it should afford equal ground of forfeiture against the vessel, that may be let out for a purpose so intimately connected with the hostile operations.

It has been argued, that the master was ignorant of the character of the service on which he was engaged, and that, in order to support the penalty, it would be necessary that there should be some proof of delinquency in him, or his owner. But I conceive, that is not necessary; it will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found. In the case of the Swedish vessel [The Carolina (1802), 4 C. Robinson, 256] there was no *mens rea* in the owner, or in any other person acting under his authority. The master was an involuntary agent, acting under compulsion, put upon him by the officers of the French government, and, so far as intention alone is considered, perfectly innocent. In the same manner in cases of *bona fide* igno-

rance, there may be no actual delinquency, but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penalty of confiscation. If imposition has been practised, it operates as force; and if redress in the way of indemnification is to be sought against any person, it must be against those, who have, by means either of compulsion or deceit, exposed the property to danger. If, therefore, it was the most innocent case on the part of the master, if there was nothing whatever to affect him with privity, the whole amount of this argument would be, that he must seek *his* redress against the freighter; otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible, in the greater number of cases, to prove the knowledge and privity of the immediate offender.

It has been argued throughout, as if the ignorance of the master alone would be sufficient to exempt the property of the owner from confiscation. But may there not be other persons, besides the master, whose knowledge and privity would carry with it the same consequences? Suppose the owner himself had knowledge of the engagement, would not that produce the *mens rea*, if such a thing is necessary? or if those who had been employed to act for the owner, had thought fit to engage the ship in a service of this nature, keeping the master in profound ignorance, would it not be just as effectual, if the *mens rea* is necessary, that it should reside in those persons, as in the owner. The observations which I shall have occasion to make on the remaining parts of this case will, perhaps, appear to justify such a supposition, either that the owner himself, or those who acted for him in Lisbon or in Holland, were conscious of the nature of the whole transaction. But I will first state *distinctly*, that the principle on which I determine this case is, that the carrying military persons to the colony of an enemy, who are there to take on them the exercise of their military functions, will lead to condemnation, and that the court is not to scan with minute arithmetic the number of persons that are so carried. If it has appeared to be of sufficient importance to the government of the enemy to send them, it must be enough to put the adverse government on the exercise of their right of prevention; and the ignorance of the master can afford no ground of exculpation in favour of the owner, who must seek his remedy in cases of deception, as well as of force, against those who have imposed

upon him. . . . I have no hesitation in pronouncing that this vessel is liable to be considered as a transport, let out in the service of the government of Holland, and that it is as such subject to condemnation.

THE ATALANTA.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1808.
6 C. Robinson, 440.

This was a case of a Bremen ship and cargo, captured on a voyage from Batavia to Bremen, on the 14th of July, 1807, having come last from the Isle of France; where a packet, containing dispatches from the government of the Isle of France to the minister of marine, at Paris, was taken on board by the master and one of the supercargoes, and was afterwards found concealed, in the possession of the second supercargo, under circumstances detailed in the judgment. . . .

Sir W. SCOTT [LORD STOWELL]. . . . I feel myself bound to pronounce, that there were papers received on board, as public dispatches, and knowingly by those who are the agents of the proprietors; . . . and that the fact of a fraudulent concealment and suppression is most satisfactorily demonstrated.

The question then is, what are the legal consequences attaching on such a criminal act? for that it is criminal and most noxious is scarcely denied. What might be the consequences of a simple transmission of dispatches, I am not called upon by the necessities of the present case to decide, because I have already pronounced this to be a *fraudulent* case. That the simple carrying of dispatches, between the colonies and the mother country of the enemy, is a service highly injurious to the other belligerent, is most obvious. In the present state of the world, in the hostilities of European powers, it is an object of great importance to preserve the connection between the mother country and her colonies; and to interrupt that connection, on the part of the other belligerent, is one of the most energetic operations of war. The importance of keeping up that connection, for the concentration of troops, and for various military purposes, is manifest; and I may add, for the supply of civil assistance also,

and support, because the infliction of civil distress, for the purpose of compelling a surrender, forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the importance of these dispatches might relate only to the civil wants of the colony, and that it is necessary to shew a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered, in the contemplation of law, as an object of hostility, although not produced by operations strictly military. How is this intercourse with the mother country kept up, in time of peace? by ships of war, or by packets in the service of the state. If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does, in fact, place himself in the service of the enemy-state, and is justly to be considered in that character. Nor let it be supposed, that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of dispatches may be conveyed the entire plan of a campaign, that may defeat all the projects of the other belligerent in that quarter of the world. It is true, as it has been said, that one ball might take off a Charles the XIIth, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that in the contemplation of human events, it is a sort of evanescent quantity of which no account is taken; and the practice has been accordingly, that it is in considerable quantities only that the offence of contraband is contemplated. The case of dispatches is very different; it is impossible to limit a letter to so small a size, as not to be capable of producing the most important consequences in the operations of the enemy: it is a service therefore which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature. . . . I have the direct authority of the superior court for pronouncing, that the carrying of dispatches of the enemy, brings on the confiscation of the vehicle so employed.

It is said, that this is more than is done even in cases of contraband; and it is true, with respect to the very lenient practice of this country, which in this matter recedes very much from

the correct principle of the law of nations, which authorizes the penalty of confiscation. . . . This country, which, however much its practice may be misrepresented by foreign writers, and sometimes by our own, has always administered the law of nations with lenity, adopts a more indulgent rule, inflicting on the ship only a forfeiture of freight in ordinary cases of contraband. But the offence of carrying despatches is, it has been observed, greater. To talk of the confiscation of the noxious article, the despatches, which constitutes the penalty in contraband, would be ridiculous. There would be no freight dependent on it, and therefore the same precise penalty cannot, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle.

Then comes the other question, whether the penalty is not also to be extended further, to the cargo, being the property of the same proprietors; not merely *ob continentiam delicti*, but likewise because the representatives of the owners of the cargo, are directly involved in the knowledge and conduct of this guilty transaction? On the circumstances of the present case I have to observe, that the offence is as much the act of those who are the constituted agents of the cargo, as of the master, who is the agent of the ship. The general rule of law is, that where a party has been guilty of an interposition in the war, and is taken *in delicto*, he is not entitled to the aid of the court, to obtain the restitution of any part of his property involved in the same transaction. It is said, that the term "interposition in the war" is a very general term, and not to be loosely applied. I am of opinion, that this is an aggravated case of active interposition in the service of the enemy, concerted and continued in fraud and marked with every species of malignant conduct. In such a case I feel myself bound, not only by the general rule, *ob continentiam delicti*, but by the direct participation of guilt in the agents of the cargo. Their own immediate conduct not only excludes all favourable distinction, but makes them pre-eminently the object of just punishment. The conclusion therefore is, that I must pronounce the ship and cargo subject to condemnation. . . .

NOTE.—A neutral vessel carrying prisoners without the consent of both belligerents is treated as a commissioned cartel ship trading with or serving one of the belligerents in violation of the duty which it owes to the other, *The Brig Betsey* (1813), 49 Ct. Cl. 125. The

fact that the unneutral service was rendered in ignorance of the existence of war does not excuse an offender who is brought before a prize court of his own country, *The Zambesi* (New South Wales, 1914), 1 Br. & Col. P. C. 358. If a vessel which is engaged in an unlawful voyage is captured while rendering unneutral service a plea of duress or compulsion will not be accepted, *The Catherina Maria* (1809), Edwards, 337, *The Seyerstadt* (1813), 1 Dodson, 241; but a vessel engaged in a lawful voyage which is compelled by *force majeure* to render unneutral service is innocent of wrong, *The Pontoporos* (Singapore, 1915), 1 Br. & Col. P. C. 371; *The Chrysopolis* (Italy, 1917), *Gazzetta Ufficiale*, March 10, 1917. A vessel carrying supplies to enemy submarines and hydroplanes and giving them information which enables them to attack the captor's fleets and coast cities, *La Bella Scutarina* (Italy, 1916), *Gazzetta Ufficiale*, May 15, 1916; or carrying Austrian and German reservists from Barcelona to Genoa, *The Federico* (France, 1914), *Décisions du Conseil des Prises*, 162; or a vessel manned by Germans but carrying no flag or papers to indicate its nationality, *The Rosita* (France, 1914), *Ib.* 171; or a vessel carrying Turkish officers with arms and money concealed in the hold, flying the Greek flag but with no papers to establish its identity, *The Olympia* (France, 1914), *Ib.* 173, is subject to condemnation for unneutral service.

For further discussion of unneutral service see *The Emanuel* (1799), 1 C. Robinson, 296; *The Rosalie and Betty* (1800), 2 *Ib.* 343; *The Carolina* (1802), 4 *Ib.* 256; *The Friendship* (1807), 6 *Ib.* 420; *The Rapid* (1810), Edwards, 228; *The Nigretia* (Japan, 1905), Takahashi, 639; *The Industrie* (Japan, 1905). *Ib.* 732; *The Quang-nam* (Japan, 1906), *Ib.* 735; *The Manouba* (1913), Willson, *The Hague Arbitration Cases*, 326; *The Thor* (St. Lucia, 1914), 1 Br. & Col. P. C. 229; *The Hanametal* (Hong-Kong, 1914), 1 *Ib.* 347; *The Proton* (Egypt, 1916), 2 *Ib.* 107; *The Svithiod* (1920), L. R. [1920] A. C. 718. See also *Int. Law Stt.* 1901, 86; *Ib.* 1902, 7; *Int. Law Topics*, 1905, 171; *Ib.* 1906, 88; Borchard, sec. 358; Cobbett, *Cases and Opinions*, II, 447; Hyde, II, 635; Moore, *Digest*, VII, 752.

CHAPTER XVII.

BLOCKADE.

SECTION 1. GENERAL RULES.

THE BETSEY.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1798.

1 C. Robinson, 93.

This was a case of a ship and cargo, taken by the English, at the capture of Guadaloupe, April the 13th, 1794; and retaken, together with that island, by the French, in June following. . . . The first seizure was defended on a suggestion, that The Betsey had broken the blockade at Guadaloupe.

SIR W. SCOTT [LORD STOWELL]. . . . On the question of blockade three things must be proved: 1st, The existence of an actual blockade; 2dly, The knowledge of the party; and, 3dly. Some act of violation, either by going in, or by coming out with a cargo laden after the commencement of blockade. The time of shipment would on this last point be very material, for although it might be hard to refuse a neutral, liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade, a neutral is no longer at liberty to make any purchase in that port.

It is necessary, however, that the evidence of a blockade should be clear and decisive: but in this case there is only an affidavit of one of the captors, and the account which is there given is, "that on the arrival of the British forces in the West Indies, a proclamation issued, inviting the inhabitants of Martinique, St. Lucie, and Guadaloupe, to put themselves under the protection of the English; that on a refusal, hostile operations were com-

menced against them all:" but it cannot be meant that they began immediately against all at once; for it is notorious that they were directed against them separately and in succession. It is further stated, "that in January, 1794, (but without any more precise date,) Guadaloupe, was summoned, and was then put into a state of complete investment and blockade."

The word *complete* is a word of great energy; and we might expect from it to find, that a number of vessels were stationed round the entrance of the port to cut off all communication: but from the protest I perceive that the captors entertained but a very loose notion of the true nature of a blockade; for it is there stated, "that on the 1st of January, after a general proclamation to the French islands, they were put into a state of *complete* blockade." It is a term, therefore, which was applied to all those islands at the same time, under the first proclamation.

The Lords of Appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade: it is clear, indeed, that it could not in reason be sufficient to produce the effect which the captors erroneously ascribed to it: but from the misapplication of these phrases in one instance I learn, that we must not give too much weight to the use of them on this occasion; and from the generality of these expressions, I think we must infer that there was not that actual blockade, which the law is now distinctly understood to require.

But it is attempted to raise other inferences on this point, from the manner in which the master speaks of the difficulty and danger of entering; and from the declaration of the Municipality of Guadaloupe, which states "the island to have been in a state of siege." It is evident that the American master speaks only of the difficulty of avoiding the English cruisers generally in those seas; and as to the other phrase, it is a term of the new jargon of France, which is sometimes applied to domestic disturbances; and certainly is not so intelligible as to justify me in concluding, that the island was in that state of investment from a foreign enemy, which we require to constitute blockade: I cannot, therefore, lay it down, that a blockade did exist till the operations of the forces were actually directed against Guadaloupe in April.

It would be necessary for me, however, to go much farther, and to say that I am satisfied also that the parties had knowledge of it: but this is expressly denied by the master. He went in without obstruction. Mr. Inledon's statement of his belief of

the notoriety of the blockade is not such evidence as will alone be sufficient to convince me of it. With respect to the shipment of the cargo, it does not appear exactly under what circumstances or what time it was taken in: I shall therefore dismiss this part of the case. . . .

THE NEPTUNUS.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1799.
2 C. Robinson, 110.

This was a case of a vessel sailing on a voyage from Dantzick to Havre, 26th October 1798, and taken in attempting to enter that port on 26th November. . . .

Sir Wm. SCOTT [LORD STOWELL]. This is a case of a ship and cargo seized in the act of entering the port of Havre in pursuance of the original intention under which the voyage began. The notification of the blockade of that port was made on the 23d February 1798, and this transaction happened in November in that year; the effect of a notification to any foreign government would clearly be to include all the individuals of that nation; it would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it; it is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold therefore that a neutral master can never be heard to aver against a notification of blockade, that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the Court of a belligerent. In the case of a blockade *de facto* only, it may be otherwise, but this is the case of a blockade by notification; another distinction between a notified blockade and a blockade existing *de facto* only, is that in the former, the act of sailing to a blockaded place is sufficient to constitute the offence. It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up, and from the moment of quitting port to sail on such a destination, the offence of violating the blockade is com-

plete, and the property engaged in it subject to confiscation: it may be different in a blockade existing *de facto* only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse, for sailing on a doubtful and provisional destination. But this is a case of a vessel from Dantzick after the notification, and the master cannot be heard to aver his ignorance of it. He sails:—till the moment of meeting Admiral Duncan's fleet, I should have no hesitation in saying, that, if he had been taken, he would have been taken *in delicto*, and have subjected his vessel to confiscation; but he meets Admiral Duncan's fleet, and is examined, and liberated by the Captain of an English frigate belonging to that fleet, who told him that he might proceed on his destination, and who, on being asked, Whether Havre was under a blockade? said "It was not blockaded," and wished him a good voyage. The question is, In what light he is to be considered after receiving this information? That it was *bona fide* given cannot be doubted, as they would otherwise have seized the vessel; the fleet must have been ignorant of the fact; and I have to lament that they were so: When a blockade is laid on, it ought by some kind of communication to be made known not only to foreign governments, but to the King's subjects, and particularly to the King's cruizers; not only to those stationed at the blockaded ports, but to others, and especially considerable fleets, that are stationed *in itinere*, to such a port from the different trading countries that may be supposed to have an intercourse with it. Perhaps it would have been safer in the English Captain to have answered, that he could not say anything of the situation at Havre; but the fact is, (and it has not been contradicted,) that the British officer told the master "that Havre was not blockaded." Under these circumstances I think, that after this information he is not taken *in delicto*. I do not mean to say that the fleet could give the man any authority to go to a blockaded port; it is not set up as an authority, but as intelligence affording a reasonable ground of belief; as it could not be supposed, that such a fleet as that was, would be ignorant of the fact.

From that time I consider that a state of innocence commences; the man was not only in ignorance, but had received positive information that Havre was not blockaded. Under these circumstances, I think it would be a little too hard to press the former offence against him; it would be to press a pretty strong principle rather too strongly; I think I cannot look retro-

spectively to the state in which he stood before the meeting with the British fleet, and therefore I shall direct this Vessel and Cargo to be restored.

THE FRANCISKA.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1855.
10 Moore, Privy Council, 37.

[The *Franciska*, a neutral Danish vessel, sailed in March, 1854, from Tarragona in Spain, with a cargo belonging to Spanish subjects, bound for Elsinore, Denmark, for orders, and thence for some safe port on the Baltic. She called at Elsinore on May 13, where she cleared "for the Baltic" generally, without naming any port. Off the entrance of the Gulf of Riga on May 22, she was captured by a British cruiser for a breach of the blockade of Riga and sent to England for adjudication. She was condemned by the judge of the High Court of Admiralty, Rt. Hon. Dr. Lushington, on the ground that the blockade was notorious at Elsinore on the day that the *Franciska* called there. The claimant, the Danish owner, appealed.]

The Right Hon. T. PEMBERTON LEIGH [LORD KINGSDOWN].

. . . .
In this case the ship was labouring under the utmost suspicion. She had no Latin pass, which the Danish Government provides for a ship of that country; she had no paper whatever on board showing the port for which she was bound. . . . There was every reason, therefore, to suspect, if Riga was at this time in a state of blockade, that the master had notice of it, and intended to break it. . . . Whatever may be the demerits of the ship, she cannot be condemned unless at the time when she committed the alleged offence the port for which she was sailing was legally in a state of blockade, and was known to be so by the master or owner. . . . It is established that on the 15th or 17th of April . . . the Admiral did establish . . . an effective blockade of the ports of Libau, Windau, and the Gulf of Riga. . . . But while the Admiral was taking these measures in the Baltic, the English and French Governments were taking measures at home of which he was ignorant,

and which it is contended seriously affect the validity of the blockade in point of law. . . . [Here follows a recital of the ordinances of the British, French, and Russian Governments.]

As regards export, therefore, from the Baltic ports, by the effect of these several Ordinances all restriction up to the 15th of May, on the conveyance of cargoes in Russian vessels to British and French ports, was removed; and though British and French vessels would, by the general Law of Nations, be liable to confiscation for breach of blockade, by sailing from blockaded ports with cargoes taken on board after notice of the blockade, and the permission to export is, by the Orders, in terms, confined to Russian vessels, it seems improbable that the Allied Powers could intend to deprive their subjects of the indulgence granted to them by the Russian Government, or to subject their property to confiscation for doing what the enemy was permitted to do with impunity.

In effect, therefore, neutrals only would be excluded from that commerce which belligerents might safely carry on; and the question is, whether by the Law of Nations such exclusion be justifiable; and, if not, in what manner and to what extent neutral powers are entitled to avail themselves of the objection.

That such exclusion is not justifiable is laid down in the clearest and most forcible language in the following passage of the judgment now under review:—"The argument stands thus: By the Law of Nations a belligerent shall not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations; and, therefore, no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of states not engaged in the war. The foundation of the principle is clear, and rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy, all relations of trade being by war itself suspended. To this principle I entirely accede; and I should regret to think if any authority could be cited from the decisions of any British Court administering the Law of Nations, which could be with truth asserted to maintain a contrary doctrine."

The learned Judge, after discussing the question how far licenses to enter blockaded ports would invalidate a blockade, and pointing out the important distinctions between blockades

according to the ordinary Law of Nations, and the blockades introduced during the last war by the Berlin and Milan Decrees on the one hand, and the British Orders in Council on the other, and between special licenses granted for a particular occasion and licenses granted indiscriminately, proceeds, "I think that if the relaxation of a blockade be, as to belligerents, entire, the blockade cannot lawfully subsist; if it be partial, and such as to exceed special occasion, that, to the extent of such partial relaxation, neutrals are entitled to a similar benefit." And he concludes his able discussion of this part of the case, in these words: "With respect to the present question, I, therefore, have come to the conclusion, that as Russian vessels might have left the ports of Courland up to the 15th of May, the subjects of neutral States ought to be entitled to the same advantages, and if there be any vessel so circumstanced I should hold her entitled to restitution. I think the remedy should be commensurate with the grievance." The learned Judge holds that such relaxation does not affect the general validity of the blockade.

In order to judge how far this conclusion can be maintained, it is necessary to consider upon what principles the right of a belligerent to exclude neutrals from a blockaded port rests. That right is founded, not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of two belligerents during war all the trade that was open to him in times of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, namely, that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded.

Grotius expresses himself upon the subject in these terms:—*"Si juris mei executionem rerum subvectio impedierit, idque scire potuerit, qui advenit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur, tenebitur ille mihi de damno culpâ dato."* *De Jure Belli ac Pacis*, lib. iii. c. i. § v.

Bynkershoek's commentary on this passage is to the effect that it is unlawful to carry anything, whether contraband or not, to a place thus circumstanced, since those who are within may be compelled to surrender, not merely by the direct application of

force, but also by the want of provisions and other necessities. "*Sola obsidio in causâ est, cur nihil obsessis subvehere liceat, sive contrabandum sit, sive non sit, nam obsessi non tantum vi coguntur ad deditionem, sed et fame, et alia aliarum rerum penuria.*" *Quas. Jur. Pub.* lib. i. c. 11.

Wheaton in his "Elements of International Law," vol. ii. pp. 228-230, justly observes that this passage in Bynkershoek goes too far, and that a blockade is not confined to the case where there is a siege or blockade with a view to the capture of a place or the expectation of peace. But these passages seem to point to the reason on which this interference with the ordinary rights of neutrals was originally justified.

Vattel lays down the same doctrine:—"Quand je tiens une place assiégée, ou seulement bloquée, je suis en droit d'empêcher que personne n'y entre, et de traiter en ennemi quiconque entreprend d'y entrer sans ma permission, ou d'y porter quoi que ce soit: car il s'oppose à mon entreprise, il peut contribuer à la faire échouer, et par là me faire tomber dans tous les maux d'une guerre malheureuse." B. iii. c. vii. s. 1, 17.

These passages refer only to ingress and the importation of goods, but it is clear that the operations of the siege or blockade may be interrupted by any communication of the blockaded or besieged place with foreigners; and Lord Stowell, when he defines a blockade, always speaks of it as the exclusion of the blockaded place from all commerce, whether by egress or ingress. In The "Frederick Molke" (1 Rob. 87), he says: "What is the object of a blockade? not merely to prevent an importation of supplies; but to prevent export as well as import; and to cut off all communication of commerce with the blockaded place." In The "Betsey" (1 Rob. 93)—"After the commencement of a blockade a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy." In The "Vrouw Judith" (1 Rob. 151)—"A blockade is a sort of circumvallation round a place, by which all foreign connexion and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place; and a neutral is no more at liberty to assist the traffic of exportation than of importation." In The "Rolla" (6 Rob. 372), "What is a blockade but a uniform universal exclusion of all vessels not privileged by law?" In The "Success" (1 Dods. 134)—"The measure which has been resorted to, being in the nature of a blockade, must operate to the

entire exclusion of British as well as neutral ships; for it would be a gross violation of neutral rights, to prohibit their trade, and to permit the subjects of this country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded."

It is contended that the objection of a neutral to the validity of a blockade, on the ground of its relaxation by a belligerent in his own favour, is removed if a Court of Admiralty allows to the neutral the same indulgence which the belligerent has reserved to himself or granted to his enemy. But their Lordships have great difficulty in assenting to this proposition. In the first place, the particular relaxation, which may be of the greatest value to the belligerents, may be of little or no value to the neutral. In the instance now before the Court it may have been of the utmost importance to Great Britain that there should be brought into her ports cargoes which, at the institution of the blockade, were in Riga; and it may have been for her advantage, with that view, to relax the blockade. But a relaxation of the blockade to that extent, and a permission to neutrals to bring such cargoes to British ports may have been of little or no value to neutrals.

The Counsel on both sides at their Lordships' bar understood that the learned Judge in this case intended thus to limit the rights of neutrals, and to place neutral vessels only in the same situation as Russians, under the Order in Council. Their Lordships would be inclined to give a more liberal interpretation to the language of the judgment; yet if this be done, the allowance of a general freedom of commerce, by way of export, to all vessels and to all places from a blockaded port, seems hardly consistent with the existence of any blockade at all.

Again, it is not easy to answer the objections a neutral might make, that the condition of things which alone authorizes any interference with his commerce does not exist, namely, the necessity of interdicting all communications by way of commerce with the place in question; that a belligerent, if he inflicts upon neutrals the inconvenience of exclusion from commerce with such place, must submit to the same inconvenience himself; and that if he is at liberty to select particular points in which it suits his purpose that the blockade should be violated with immunity, each neutral, in order to be placed on equal terms with the belligerent, should be at liberty to make such selection for himself.

But the ambiguity in which all these questions are left by the

Order in Council of the 15th of April; the doubt whether the liberty accorded to enemies' vessels extends to neutrals, and, if so, whether such liberty is subject to the same restrictions, or to any other and what restrictions, affords, in the opinion of their Lordships, another strong argument against the legality of the blockade in this case. If a partial, modified blockade is to be enforced against neutrals, justice seems to require that the modifications intended to be introduced should be notified to neutral States, and they should be fully apprized what acts their subjects may or may not do. They cannot reasonably be exposed to the hardship of either abstaining from all commerce with a place in such a state of uncertain blockade, or of having their ships seized and sent to the country of the belligerent, in order to learn there, from the decision of its Court of Admiralty, whether the conduct they have pursued is, or is not, protected by an equitable interpretation of an instrument in which they are not expressly included.

If these views of the law be correct, this ship cannot be considered to have had notice of any blockade of Riga at the time when she sailed for that port; for, in truth, no legal blockade was then in existence, and it would be hard to require a neutral to speculate on the probability, however great, of a legal blockade *de facto* being established at a future time, when he is not permitted to speculate on the chance of its discontinuance after he has once had notice of its existence. . . .

Supposing, however, the blockade in this case to be open to no objections in point of law during the interval between the 15th of April and the 15th of May, it remains to be inquired whether the notice which this ship received of its existence was of such a character as to subject her to the penalty of confiscation for disregarding it. Notice has been imputed to the claimant in the Court below from the alleged notoriety of the blockade on the 14th of May, at Elsinore, where the ship touched, and at Copenhagen, where the owner resided.

It is contended by the appellant that in case of ingress of a port subject to a blockade only *de facto* of which there has not been any official notification, guilty knowledge cannot be inferred in an individual from general notoriety, and that a ship is always entitled under such circumstances to warning from the blockading squadron before she is exposed to seizure.

To this proposition their Lordships are unable to accede. If a blockade *de facto* be good in law without notification, and a

wilful violation of a known legal blockade be punishable with confiscation—propositions which are free from doubt,—the mode in which the knowledge has been acquired by the offender, if it be clearly proved to exist, cannot be of importance. Nor does there seem for this purpose to be much difference between ingress, in which a warning is said to be indispensable, and egress, in which it is admitted to be unnecessary.

The fact of knowledge is capable of much easier proof in the one case than in the other; but when once the fact is clearly proved, the consequences must be the same. The reasoning of the learned Judge of the Court below in this case, and the language of Lord Stowell in *The "Adelaide"* reported in the note to *The "Neptunus"*, (2 Rob. 111) and *The "Hurtige Hane"*, (3 Rob. 324,) are conclusive upon this point.

But while their Lordships are quite prepared to hold that the existence and extent of a blockade may be so well and so generally known, that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron, yet the fact, with notice of which the individual is so to be fixed, must be one which admits of no reasonable doubt. "Any communication which brings it to the knowledge of the party," to use the language of Lord Stowell in *The "Rolla"*, (6 Rob. 367), "in a way which could leave no doubt in his mind as to the authenticity of the information."

Again, the notice to be inferred from general notoriety, must be of such a character that if conveyed by a distinct intimation from a competent authority it would have been binding; the notice cannot be more effectual because its existence is presumed, than it would be if it were directly established in evidence. The notice to be inferred from the acts of a belligerent, which is to supply the place of a public notification, or of a particular warning, must be such as, if given in the form of a public notification, or of a particular warning, would have been legal and effectual.

For this purpose the notice of the blockade must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy, when in truth he has only blockaded one; such a course would introduce all the evils of what is termed a paper blockade, and would be attended with the grossest injus-

tice to the commerce of neutrals. Accordingly a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade, for afterwards attempting to enter the port which really is blockaded.

This was distinctly laid down by Lord Stowell in the case of *The "Henrich and Maria"*, (1 Rob., 148), where an officer of the blockading squadron had informed a neutral that all the Dutch ports were in a state of blockade, whereas the blockade was confined to Amsterdam. The ship was afterwards captured for an alleged attempt to enter Amsterdam, and Lord Stowell, in decreeing restitution, observed: "The notice is, I think, in point of authority, illegal; at the time when it was given, there was no blockade which extended to all the Dutch ports. A declaration of blockade is a high act of sovereignty; and a Commander of a King's ship is not to extend it. The notice is, also, I think, as illegal in effect as in authority: it cannot be said that such a notice, though bad for other ports, is good for Amsterdam. It takes from the neutral all power of election as to what other port of Holland he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress; and I am of the opinion, that if the neutral had contravened the notice, he would not have been subject to condemnation."

The authority of this case is fully recognized by Dr. Lushington in the present case, who observes that such an administration of law in protecting the party misled, was most just.

Applying these principles to the evidence before them, their Lordships can have no doubt that the master and owner in this case are to be fixed with notice of all that was publicly known at Copenhagen on the 14th of May, on the subject of the blockade; that it was known there that merchant-vessels had been turned back from ports on the coast of Courland, and that a general impression prevailed that vessels seeking to enter Russian ports ran great risk of seizure; and that the owner in this case shared that impression, and that to this cause are to be attributed the want of proper ships' papers, which has been already alluded to, and the absence, on the further proof, of any affidavit on the part of the owner denying knowledge of the blockade. . . .

[Their Lordships then examine the evidence as to what was known at Copenhagen as to the blockade of the Russian coast, and find that the only notice which the master could have received there at that time would have been that the entire Rus-

sian cost was blockaded,—a notice which was contrary to the facts and which if received from a British officer he would have been justified in disregarding.]

Their Lordships . . . must advise a restitution of the ship (or rather the proceeds, for it appears to have been sold) and of the freight, but certainly without any costs or damages to the claimant. There will be simple restitution, without costs or expenses to either party.

THE PETERHOFF.

SUPREME COURT OF THE UNITED STATES. 1866.

5 Wallace, 28.

Appeal from the District Court for the Southern District of New York.

[In 1862 the President proclaimed a blockade of the "whole coast from the Chesapeake Bay to the Rio Grande." About forty miles up the Rio Grande, on the American side of the river, is the town of Brownsville. On the opposite bank in Mexico is the city of Matamoras. While the blockade was in force, the Peterhoff, a British vessel, sailed from London for Matamoras, with a miscellaneous cargo part of which was the property of the owner of the vessel. In the Caribbean Sea to the south of Cuba, she was captured by an American war vessel and taken to New York where the vessel and cargo were condemned for intent to violate the blockade by sending her cargo in lighters up the river Rio Grande to the city of Matamoras, from which point much of her cargo was to be sent into Texas.]

The CHIEF JUSTICE [CHASE] delivered the opinion of the court. . . .

It was maintained in argument (1) that trade with Matamoras, at the time of the capture, was made unlawful by the blockade of the mouth of the Rio Grande; and if not, then (2) that the ulterior destination of the cargo was Texas and the other States in rebellion, and that this ulterior destination was in breach of the blockade. . . .

In determining the question whether this blockade was in-

tended to include the mouth of the Rio Grande, the treaty with Mexico, 9 Stat. at Large, 926, in relation to that river must be considered. It was stipulated in the 5th article that the boundary line between the United States and Mexico should commence in the Gulf, three leagues from land opposite the mouth of the Rio Grande, and run northward from the middle of the river. And in the 7th article it was further stipulated that the navigation of the river should be free and common to the citizens of both countries without interruption by either without the consent of the other, even for the purpose of improving the navigation.

The mouth of the Rio Grande was, therefore, for half its width, within Mexican territory, and, for the purposes of navigation, was, altogether, as much Mexican as American. It is clear, therefore, that nothing short of an express declaration by the Executive would warrant us in ascribing to the government an intention to blockade such a river in time of peace between the two Republics. . . . And we are the less inclined to say it, because we are not aware of any instance in which a belligerent has attempted to blockade the mouth of a river or harbor occupied on one side by neutrals, or in which such a blockade has been recognized as valid by any court administering the law of nations. . . .

We come next to the question whether an ulterior destination to the rebel region, which we now assume as proved, affected the cargo of the Peterhoff with liability to condemnation. We mean the neutral cargo: reserving for the present the question of contraband. . . .

It is an undoubted general principle, recognized by this court in the case of *The Bermuda*, and in several other cases, that an ulterior destination to a blockaded port will infect the primary voyage to a neutral port with liability for intended violation of blockade.

The question now is whether the same consequences will attend an ulterior destination to a belligerent country by inland conveyance. And upon this question the authorities seem quite clear.

During the blockade of Holland in 1799, goods belonging to Prussian subjects were shipped from Edam, near Amsterdam, by inland navigation to Emden, in Hanover, for transshipment to London. Prussia and Hanover were neutral. The goods were captured on the voyage from Emden, and the cause, *The Stert*,

4 Robinson, 65, came before the British Court of Admiralty in 1801. It was held that the blockade did not affect the trade of Holland carried on with neutrals by means of inland navigation. "It was," said Sir William Scott, "a mere maritime blockade effected by force operating only at sea." He admitted that such trade would defeat, partially at least, the object of the blockade, namely, to cripple the trade of Holland, but observed, "If that is the consequence, all that can be said is that it is an unavoidable consequence. It must be imputed to the nature of the thing which will not admit of a remedy of this species. The court cannot on that ground take upon itself to say that a legal blockade exists where no actual blockade can be applied. . . . It must be presumed that this was foreseen by the blockading state, which, nevertheless, thought proper to impose it to the extent to which it was practicable."

The same principle governed the case of *The Ocean*, 3 Robinson, 297, made also in 1801. At the time of her voyage Amsterdam was blockaded, but the blockade had not been extended to the other ports of Holland. Her cargo consisted partly or wholly of goods ordered by American merchants from Amsterdam and sent thence by inland conveyance to Rotterdam, and there shipped to America. It was held that the conveyance from Amsterdam to Rotterdam, being inland, was not affected by the blockade, and the goods, which had been captured, were restored.

These were cases of trade from a blockaded to a neutral country by means of inland navigation, to a neutral port or a port not blockaded. The same principle was applied to trade from a neutral to a blockaded country by inland conveyance from the neutral port of primary destination to the blockaded port of ulterior destination in the case of the *Jonge Pieter*, 4 Robinson, 79, adjudged in 1801. Goods belonging to neutrals going from London to Emden, with ulterior destination by land or an interior canal navigation to Amsterdam were held not liable to seizure for violation of the blockade of that port. . . . These cases fully recognize the lawfulness of neutral trade to or from a blockaded country by inland navigation or transportation.

The general doctrines of international law lead irresistibly to the same conclusion. We know of but two exceptions to the rule of free trade by neutrals with belligerents: the first is that there must be no violation of blockade or siege: and the second, that there must be no conveyance of contraband to either bellig-

erent. And the question we are now considering is, "Was the cargo of the *Peterhoff* within the first of these exceptions?" We have seen that *Matamoras* was not and could not be blockaded; and it is manifest that there was not and could not be any blockade of the Texan bank of the *Rio Grande* as against the trade of *Matamoras*.

We must say, therefore, that trade, between *London* and *Matamoras*, even with attempt to supply, from *Matamoras*, goods to *Texas*, violated no blockade, and cannot be declared unlawful.

[The remaining portion of the opinion, dealing with the question of contraband, may be found, *post*, 677.]

NOTE.—The right to blockade an enemy's ports by a competent force is secured to every belligerent by the law of nations and neutrals are bound to respect it, *M'Call v. Marine Insurance Co.* (1814), 8 Cranch, 59; *The Prize Cases* (1863), 2 Black, 635; *The Admiral* (1866), 3 Wallace, 603. As it is a war right it can be exercised only when war exists, *Ford v. Surget* (1879), 97 U. S. 594. A declaration of a blockade is a high act of sovereignty and can be made only on governmental authority, *The Henrick and Maria* (1799), 1 C. Robinson, 146, 148, but before the invention of the telegraph it was held that a commander on a distant station might institute a blockade without express authority, *The Rolla* (1807), 6 Ib. 364. A blockade of a single port may be instituted by a subordinate officer when it is a part of another military or naval operation, *The Circassian* (1865), 2 Wallace, 135; *The Adula* (1900), 176 U. S. 361.

The gist of the offense of breach of blockade lies, in Anglo-American prize law, in the intent to enter a blockaded port, *The Columbia* (1799), 1 C. Robinson, 154; *The James Cook* (1810), Edwards, 261; *The Veteran* (1905), Takahashi, 714. Hence a blockade runner is *in delicto* from the moment of sailing, *The Galen* (1901), 37 Ct. Cl. 89, and the mere act of sailing is illegal and subjects the vessel to capture, *The Neptunus* (1799), 2 C. Robinson, 110; *The Panaghia Rhomba* (1858), 12 Moore, P. C. 168; *The Bermuda* (1866), 3 Wallace, 514; *United States v. Hallock* (1864), 154 U. S. 537. But the intent must be established by affirmative evidence. Mere suspicion is not enough, *The Newfoundland* (1900), 176 U. S. 97. For discussions of evidence showing intent see *The Sea Witch* (1868), 6 Wallace, 242; *The Flying Scud* (1868), 6 Ib. 263; *The Adela* (1868), 6 Ib. 266; *The Wren* (1868), 6 Ib. 582. But sailing for a blockaded port is an innocent act unless accompanied by knowledge of the blockade, *Fitzsimmons v. Newport Insurance Co.* (1808), 4 Cranch, 185, 198; *Yeaton v. Fry* (1809), 5 Cranch, 335; *The Admiral* (1866), 3 Wallace, 603. Whether knowledge is derived from a formal proclamation, *The Cornelius* (1866), 3 Wallace, 214, or from notification entered on a vessel's log or from any other source is immaterial, *The Adula* (1900), 176 U. S. 361. Under Anglo-American practice a master with notice

of a blockade is not permitted to approach a blockaded port for the purpose of inquiring whether the blockade has been raised, *The Spes* (1804), 5 C. Robinson, 76; *The Little William* (1809), 1 Acton, 141; *The Josephine* (1866), 3 Wallace, 83; *The Cheshire* (1866), 3 Wallace, 231; but the French permit him to hope that the blockade will have been discontinued by the time of his arrival and hence he may approach for inquiry, *Bonflis* (Fauchille), sec. 1663. Vessels may expose themselves to seizure merely by suspicious conduct, as by hovering about the entrance to a blockaded port, *The Neutralitet* (1805), 6 C. Robinson, 30; *The Charlotte Christine* (1805), 6 Ib. 101. St. Paul's admonition, "Avoid the very appearance of evil," is a good rule for the conduct of neutral vessels at sea in time of war. But under the pressure of great necessity, such as unseaworthiness or lack of provisions, a neutral vessel may be justified in taking refuge in a blockaded port, *The Diana* (1869), 7 Wallace, 354. "Real and irresistible distress," said Lord Stowell, "must be at all times a sufficient passport for human beings under any such application of human law." See *The Hurtige Hane* (1799), 2 C. Robinson, 124; *The Charlotta* (1810), Edwards, 252; *Hallett & Bowne v. Jenks* (1805), 3 Cranch, 210; *Brig Short Staple v. United States* (1815), 9 Ib. 55; *The Aeolus* (1813), 3 Wheaton, 392. But he who pleads the necessity has the burden of proof, *The Diana* (1869), 7 Wallace, 354.

In the Great War, the Italian Prize Court held that if a vessel violates a blockade both the vessel and the cargo are subject to confiscation unless it can be proved that at the beginning of the voyage the owners of the cargo neither knew nor could have known of an intention to violate the blockade, *The Aghios Spiridon*, *Gazzetta Ufficiale*, Feb. 10, 1916. Knowledge of a blockade may be inferred from the proximity of the neutral point of departure, the length of time between the institution of the blockade and the sailing of the neutral vessel, the continuous relations between the inhabitants of the neutral and belligerent countries and especially from the fact that the cargo is composed in great part of conditional contraband, *The Aghia Elene*, Ib. March 1, 1916.

The penalty for breach of blockade is confiscation of the vessel and cargo. In *The Mercurius* (1798), 1 C. Robinson, 80, Lord Stowell made a distinction when the vessel and cargo belonged to different owners, but this distinction was abandoned, even by Lord Stowell himself, *The Alexander* (1801), 4 Ib. 93; *The Adonis* (1804), 5 Ib. 256; *The Exchange* (1808), Edwards, 39; *The James Cook* (1810), Ib. 261; *The Panaghia Rhomba* (*Baltazzi v. Ryder*) (1858), 12 Moore, P. C. 168; *The William Bagaley* (1867), 5 Wallace, 377, 410. Success in eluding the blockading force does not exempt a vessel from capture, *The Welvaart Van Pillaw* (1799), 2 C. Robinson, 123, but it remains liable to capture until the end of its return voyage, *The Wren* (1868), 6 Wallace, 582, unless prior to capture the blockade has been raised, *The Lisette* (1806), 6 C. Robinson, 387.

The conditions of the Great War transformed the practice of nations as to blockades. Aside from some blockades of minor importance, such as that established by Austria-Hungary against Montenegro,

that of Great Britain and France against German East Africa, that of Japan against Kiao-Chau, that of Italy against Austria and Albania, that of Great Britain and France against Bulgaria and Greece, and a few others, the blockade, as that term was understood prior to 1914, was not used. The war zone established by Germany about Great Britain in 1915, which was directed especially against enemy vessels, and the war zone established in January, 1917, which was directed against both enemy and neutral vessels and within which "all sea traffic was to be forthwith opposed by means of mines and submarines" were not in accordance with the pre-war law of blockade. On the other hand, an effective blockade of Germany under the rules which obtained in previous wars was made impossible by its geographical situation. So long as transit through the Scandinavian countries and Holland was open, the blockade of the German coast was of little value. Great Britain therefore undertook to prevent all commerce with Germany whether through German ports or through the territories of her neutral neighbors. The measure was not described as a blockade and was not carried on in accordance with the rules of blockade. It provoked sharp protests from neutrals whose trade was interrupted. The chief protestant was the United States, which, however, when it became a belligerent, assisted in the attainment of the end in view by forbidding any exports to neutral countries which it had not licensed. There is a clear legal distinction between the British exclusion from neutral countries of neutral goods which were destined to Germany and the refusal of the United States to permit the export to neutral countries of goods with an enemy destination. In substance, however, and in their actual relation to both the enemy and the neutral countries, the two measures are identical. Furthermore, in assisting in the exclusion of the goods of other neutral countries from the neutral countries adjacent to Germany, the United States took the same position as Great Britain. On the German war zone, see Garner, I, ch. xiv. The discussion between the American and British Governments as to British interference with neutral trade is well summarized in Hyde, II, 627 and in Garner, II, ch. xxxiii.

On the law of blockade see Atherley-Jones, ch. ii; Bonfils (Fauchille), sec. 1606; Fauchille, *Du Blocus Maritime*; J. A. Hall, *The Law of Naval Warfare*, ch. vi; *Int. Law Situations*, 1901, 139; *Ib.* 1907, 109; *Ib.* 1908, 9, 98; *Ib.* 1912, 114; *Int. Law Topics*, 1914, 100; Cobbett, *Cases and Opinions*, II, 394; Hyde, II, 647; Moore, *Digest*, VII, ch. xvii.

SECTION 2. NOTIFIED AND DE FACTO BLOCKADES.

THE ADULA.

SUPREME COURT OF THE UNITED STATES. 1900.
176 U. S. 361.

Appeal from the District Court of the United States for the Southern District of Georgia.

MR. JUSTICE BROWN . . . delivered the opinion of the court.

The rectitude of the decree of the District Court condemning the *Adula* as prize of war depends upon the existence of a lawful and effective blockade at Guantanamo, the knowledge of such blockade by those in charge of the vessel, and their intent in making the voyage from Kingston.

1. No blockade of Guantanamo was ever proclaimed by the President. A proclamation had been issued June 27, establishing a blockade of all ports on the southern coast of Cuba between Cape Frances on the west and Cape Cruz on the east, but as both Santiago and Guantanamo are to the eastward of Cape Cruz, they were not included. It appears, however, that blockades of Santiago and Guantanamo were established in the early part of June by order of Admiral Sampson, commander of the naval forces then investing the ports on the southern coast of Cuba, and were maintained as actual and effective blockades until after the capture of the *Adula*.

The legality of a simple or actual blockade as distinguished from a public or presidential blockade is noticed by writers upon international law, and is said by Halleck to be "constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence." Halleck, *Int. L.* ch. 23, sec. 10.) A *de facto* blockade was also recognized as legal by this court in the case of *The Circassian*, 2 Wall. 135, 150, in which the question arose as to the blockade of New Orleans during the civil war. In delivering the opinion of the court, the Chief Justice observed: "There is a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation." A like ruling was made by Sir William Scott in the case of *The Rolla*, 6 C. Rob. 364, which was the case of an American ship and cargo, proceeded against for the

breach of a blockade at Montevideo, imposed by the British commander. It was argued, apparently upon the authority of *The Henrick and Maria*, 1 C. Rob. 123, that the power of imposing a blockade is altogether an act of sovereignty which cannot be assumed or exercised by a commander without special authority. But says the learned judge: "The court then expressed its opinion that this was a position not maintainable to that extent; because a commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority, delegated to him, as may be necessary to provide for the exigencies of the service upon which he is employed. On stations in Europe, where government is almost at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may be different. But in distant ports of the world it cannot be disputed, I conceive, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy, as against the enemy himself, for the immediate purpose of reduction." See also *The Johanna Maria*, Deane on Blockades, 86.

In view of the operations then being carried on for the purpose of destroying or capturing the Spanish fleet and reducing Santiago, we think it was competent for Admiral Sampson to establish a blockade there and at Guantanamo as an adjunct to such operations. Indeed, it would seem to have been a necessity that restrictions should be placed upon the power of neutrals to carry supplies and intelligence to the enemy as they would be quite sure to do if their ships were given free ingress and egress from these harbors. While there could be no objections to vessels carrying provisions to the starving insurgents, if their destination could be made certain, the probabilities were that such provisions carried to a beleaguered port, would be immediately seized by the enemy and used for the sustenance of its soldiers. The exigency was one which rendered it entirely prudent for the commander of the fleet to act, without awaiting instructions from Washington.

But it is contended that at the time of the capture, the port of Guantanamo was completely in the possession and control of the United States, and therefore that the blockade had been terminated. It appears, however, that Guantanamo is eighteen miles from the mouth of Guantanamo Bay. Access to it is obtained either by a small river emptying into the upper bay, or

by rail from Caimanera, a town on the west side of the upper bay. It seems that the Marblehead and the Yankee were sent to Guantanamo on June 7; entered the harbor and took possession of the lower bay for the use of American vessels; that the Panther and Yosemite were sent there on the 10th, and on the 12th the torpedo boat Porter arrived from Guantanamo with news of a land battle, and from that time the harbor was occupied by naval vessels, and by a party of marines who held the crest of a hill on the west side of the harbor near its entrance, and the side of the hill facing the harbor. But the town of Guantanamo, near the head of the bay, was still held by the Spanish forces, as were several other positions in the neighborhood. The campaign in the vicinity was in active progress, and encounters between the United States and Spanish troops were of frequent occurrence.

In view of these facts we are of opinion that, as the city of Guantanamo was still held by the Spaniards, and as our troops occupied only the mouth of the bay, the blockade was still operative as against vessels bound for the city of Guantanamo. . . . [The court also finds that both the charterer and officers of the *Adula* knew of the blockade and intended to violate it.]

The decree of the District Court was correct and it is therefore
Affirmed.

MR. JUSTICE SHIRAS, with whom concurred MR. JUSTICE GRAY,
MR. JUSTICE WHITE and MR. JUSTICE PECKHAM, dissenting.

NOTE.—Accord: *The Circassian* (1865), 2 Wallace, 135. The correctness of the decision in both *The Circassian* and *The Adula* may well be doubted. The defeated claimants in *The Circassian* appealed to the British and American Claims Commission provided for by the Treaty of Washington which allowed their claims. The opinion of the dissenting commissioner in favor of sustaining the Supreme Court went upon the ground that there was a distinction between the city of New Orleans and the port of New Orleans; that the blockade had extended to the whole port while the military occupation comprised only the city which, in point of area, was but a small part of the port. See Moore, *Int. Arb.* IV, 3911, and an able discussion by Everett P. Wheeler in "The Law of Prize as affected by Decisions upon Captures made during the Late War between Spain and the United States," in *Col. Law Rev.* I, 141, 150.

For discussions of the distinction between notified and *de facto* blockades see *The Vrouw Judith* (1798), 1 C. Robinson, 150; *The Mercurious* (1798), 1 Ib. 80; *The Neptunus* (1799), 1 Ib. 170; *The Betsey* (1799), 1 Ib. 332; *The Vrow Johanna* (1799), 2 Ib. 109;

The Neptunus (1799), 2 Ib. 110; The Welvaart Van Pillaw (1799), 2 Ib. 128; The Adelaide (1799), 2 Ib. 111 n.; The Christina Margaretha (1805), 6 Ib. 62; The Franciska (1855), Spinks, III; The Circassian (1865), 2 Wallace, 135; The Adula (1900), 176 U. S. 361; Bonfils (*Fauchille*), sec. 1639; Hyde, II, 669; Moore, *Digest*, VII, 783.

SECTION 3. A BLOCKADE MUST BE EFFECTIVE.

THE OLINDE RODRIGUES.

SUPREME COURT OF THE UNITED STATES. 1899.
174 U. S. 510.

Appeal from the District Court of the United States for the District of South Carolina.

[The Olinde Rodrigues, a steamship belonging to a French corporation, sailed from France for the West Indies June 16, 1898. On June 27, the President of the United States proclaimed a blockade of San Juan, Porto Rico. On July 4, the steamer entered the harbor of San Juan and on coming out the next day was boarded by the American cruiser Yosemite. She disclaimed any knowledge that San Juan was blockaded, whereupon the boarding officer entered an official warning on her log and she was allowed to proceed. On July 17 she was captured by the American cruiser New Orleans, then blockading San Juan, for attempting to enter that port, taken to Charleston, South Carolina, and libelled. The District Court held that there was no effective blockade of the port of San Juan. The United States appealed.]

MR. CHIEF JUSTICE FULLER . . . delivered the opinion of the court.

We are unable to concur with the learned District Judge in the conclusion that the blockade of the port of San Juan at the time this steamship was captured was not an effective blockade.

To be binding, the blockade must be known, and the blockading force must be present; but is there any rule of law determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but on the contrary, that the test is whether the blockade is prac-

tically effective, and that that is a question, though a mixed one, more of fact than of law.

The fourth maxim of the Declaration of Paris (April 16, 1856) was: "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Manifestly this broad definition was not intended to be literally applied. The object was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the presence of any force, or an inadequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances.

This was put by Lord Russell in his note to Mr. Mason of February 10, 1861, thus: "The Declaration of Paris was in truth directed against what were once termed 'paper blockades;' that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing or the like. . . . The interpretation, therefore, placed by Her Majesty's Government on the declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. . . . It is proper to add, that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St. James (Mr. Dallas) during the communications which passed between the two governments some years before the present war, with a view to the accession of the United States to that declaration." Hall's Int. Law, § 260, p. 730, note.

The quotations from the Parliamentary debates, of May, 1861, given by Mr. Dana in note 233 to the eighth edition of Wheaton on International Law, afford interesting illustrations of what was considered the measure of effectiveness; and an extract is also there given from a note of the Department of Foreign Affairs of France of September, 1861, in which that is defined: "Forces sufficient to prevent the ports being approached without exposure to a certain danger."

In *The Mercurius*, 1 C. Rob. 80, 84, Sir William Scott stated: "It is said, this passage to the Zuyder Zee was not in a state of blockade; but the ship was seized immediately on entering it; and I know not what else is necessary to constitute blockade.

The powers who formed the armed neutrality in the last war, understood blockade in this sense; and Russia, who was the principal party in that confederacy, described a place to be in a state of blockade, when it is dangerous to attempt to enter into it."

And in *The Frederick Molke*, 1 C. Rob. 86, the same great jurist said: "For that a legal blockade did exist, results necessarily from these facts, as nothing farther is necessary to constitute blockade, than that there should be a force stationed to prevent communication, and a due notice, or prohibition given to the party."

Such is the settled doctrine of the English and American courts and publicists, and it is embodied in the second of the instructions issued by the Secretary of the Navy, June 20, 1898, General Order No. 492: "A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous."

Clearly, however, it is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a blockade. It is enough if the danger is real and apparent.

In *The Franciska*, 2 Spinks, 128, Dr. Lushington, in passing on the question whether the blockade imposed on the port of Riga was an effective blockade, said: "What, then, is an efficient blockade, and how has it been defined, if, indeed, the term 'definition' can be applied to such a subject? The one definition mentioned is, that egress or entrance shall be attended with evident danger; another, that of Chancellor Kent, (1 Kent's Com. 146,) is, that it shall be apparently dangerous. All these definitions are and must be, from the nature of blockades, loose and uncertain; the maintenance of a blockade must always be a question of degree,—of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention, nor, indeed, more opposed to my notions of the Law of Nations, than any relaxation of the rule that a blockade must be efficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone."

"It is impossible," says Mr. Hall, (§ 260,) "to fix with any accuracy the amount of danger in entry which is necessary to preserve the validity of a blockade. It is for the prize courts

of the belligerent to decide whether in a given instance a vessel captured for its breach had reason to suppose it to be non-existent; or for the neutral government to examine, on the particular facts, whether it is proper to withhold or to withdraw recognition."

In *The Hoffnung*, 6 C. Rob. 112, 117, Sir William Scott said: "When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months, without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force, and which introduces therefore a very different train of presumptions, in favor of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed." And undoubtedly a blockade may be so inadequate, or the negligence of the belligerent in maintaining it may be of such a character, as to excuse neutral vessels from the penalties for its violation. Thus in the case of an alleged breach of the blockade of the island of Martinique, which had been carried on by a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island, it was held that their withdrawal was a neglect which "necessarily led neutral vessels to believe these ports might be entered without incurring any risk." *The Nancy*, 1 Acton, 57, 59.

But it cannot be that a vessel actually captured in attempting to enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, could dispute the efficiency of the force to which she was subjected.

As we hold that an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position cannot be maintained that one modern cruiser though sufficient in fact is not sufficient as matter of law.

Even as long ago as 1809, in *The Nancy*, 1 Acton, 63, where the station of the vessel was sometimes off the port of Trinity

and, at others, off another port more than seven miles distant, it was ruled that: "Under particular circumstances a single vessel may be adequate to maintain the blockade of one port and co-operate with other vessels at the same time in the blockade of another neighboring port;" although there Sir William Grant relied on the opinion of the commander on that station that the force was completely adequate to the service required to be performed.

The ruling of Dr. Lushington in *The Franciska*, above cited, was to that effect, and the text-books refer to other instances.

The learned District Judge, in his opinion, refers to the treaty between France and Denmark of 1742, which provided that the entrance to a blockaded port should be closed by at least two vessels or a battery on shore; to the treaty of 1760 between Holland and the Two Sicilies prescribing that at least six ships of war should be ranged at a distance slightly greater than gunshot from the entrance; and to the treaty between Prussia and Denmark of 1818, which stipulated that two vessels should be stationed before every blockaded port; but we do not think these particular agreements of special importance here, and, indeed, Ortolan, by whom they are cited, says that such stipulations cannot create a positive rule in all cases even between the parties, "since the number of vessels necessary to a complete investment depends evidently on the nature of the place blockaded." 2 Ortolan, (4th ed.) 330, and note 2.

Nor do we regard Sir William Scott's judgment in *The Arthur*, (1814) 1 Dodson, 423, 425, as of weight in favor of claimants. In effect the ruling sustained the validity of the maintenance of blockade by a single ship, and the case was thus stated: "This is a claim made by one of His Majesty's ships to share as joint-captor in a prize taken in the river Ems by another ship belonging to His Majesty, for a breach of the blockade imposed by the order in council of the 26th of April, 1809. This order was, among others, issued in the way of retaliation for the measures which had been previously adopted by the French government against the commerce of this country. The blockade imposed by it is applicable to a very great extent of coast, and was never intended to be maintained according to the usual and regular mode of enforcing blockades, by stationing a number of ships and forming as it were an arch of circumvallation around the mouth of the prohibited port. There, if the arch fails in any one part, the blockade itself fails altogether; but this species

of blockade, which has arisen out of the violent and unjust conduct of the enemy, was maintained by a ship stationed anywhere in the neighborhood of the coast, or, as in this case, in the river itself, observing and preventing every vessel that might endeavor to effect a passage up or down the river.”

Blockades are maritime blockades, or blockades by sea and land; and they may be either military or commercial, or may partake of the nature of both. The question of effectiveness must necessarily depend on the circumstances. We agree that the fact of a single capture is not decisive of the effectiveness of a blockade, but the case made on this record does not rest on that ground.

We are of opinion that if a single modern cruiser blockading a port renders it in fact dangerous for other craft to enter the port, that is sufficient, since thereby the blockade is made practically effective. . . .

Assuming that the Olinde Rodrigues attempted to enter San Juan, July 17, there can be no question that it was dangerous for her to do so, as the result itself demonstrated. She had had actual warning twelve days before; no reason existed for the supposition that the blockade had been pretermitted or relaxed; her commander had no right to experiment as to the practical effectiveness of the blockade, and, if he did so, he took the risk; he was believed to be making the attempt, and was immediately captured. In these circumstances the vessel cannot be permitted to plead that the blockade was not legally effective. . . .

[The court then finds that while the conduct of the Olinde Rodrigues on July 17 was so suspicious as to justify seizure the facts did not clearly show an intent to enter the port of San Juan.]

The entire record considered, we are of opinion that restitution of the Olinde Rodrigues should be awarded, without damages, and that payment of the costs and expenses incident to her custody and preservation, and of all costs in the cause except the fees of counsel, should be imposed upon the ship.

The decree of the District Court will be so modified, and

As modified affirmed.

MR. JUSTICE MCKENNA dissented on the ground that the evidence justified condemnation.

NOTE.—In 1806-07 Great Britain and France, by a series of proclamations which were fantastic in their absurdity, purported to establish complete blockades of each other's coasts. See The Arthur (1814),

1 Dodson, 423; *The Fox* (1811), Edwards, 311. The obvious impossibility of sustaining such extravagant pretensions and the damage inflicted upon neutral commerce strengthened the view which had been many times asserted that neutrals should recognize only such blockades as belligerents could make effective. In 1800, John Marshall, then Secretary of State, wrote to the American minister to England:

If the effectiveness of the blockade be dispensed with, then every port of the belligerent powers may at all times be declared in that state, and the commerce of neutrals be thereby subjected to universal capture. But, if this principle be strictly adhered to, the capacity to blockade will be limited by the naval force of the belligerent, and, of consequence, the mischief to neutral commerce cannot be very extensive.

Moore, *Digest*, VII, 788.

As to what constitutes an effective blockade see *Gelpel v. Smith* (1872), L. R. 7 Q. B. 404, 410; *The Adula* (1900), 176 U. S. 361; *Hooper v. United States* (1887), 22 Ct. Cl. 408; *The King Arthur* (1905), Takahashi, 721. The number and position of the blockading vessels is immaterial so long as they are able to make the blockade effective, *The Franciska* (1855), 10 Moore, P. C. 37, and in the absence of evidence to the contrary the testimony of the commander of the blockading squadron as to its effectiveness will be accepted, *The Nancy* (1809), 1 Acton, 63. The fact that blockading vessels are not seen on approaching the port does not render the blockade ineffective, *The Andromeda* (1865), 2 Wallace, 481, nor will a temporary withdrawal of the blockading force because of stress of weather, *The Frederick Molke* (1798), 1 C. Robinson, 86; *The Columbia* (1799), 1 C. Robinson, 154, but lack of diligence on the part of the blockading squadron will be evidence that there was no blockade actually in existence, *The Juffrow Maria Schroeder* (1800), 3 C. Robinson, 147. Batteries ashore as well as ships afloat may be used in the maintenance of a blockade, *The Circassian* (1865), 2 Wallace, 135, and it would seem that temporary obstructions in the channels and harbors of the blockaded port are permissible. See Moore, *Digest*, VII, 855. As to blockade by sub-marine mines during the Great War, see Phillipson, *International Law and the Great War*, 381. See also Hyde, II, 655; Moore, *Digest*, VII, 788.

CHAPTER XVIII.

CONTRABAND.

SECTION 1. ABSOLUTE AND CONDITIONAL CONTRABAND.

THE JONGE MARGARETHA.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1799.
1 C. Robinson, 189.

This was a case of a Papenberg ship, taken on a voyage from Amsterdam to Brest with a cargo of cheese, April 1797. . . .

Sir W. SCOTT [LORD STOWELL].—There is little reason to doubt the property in this case, and therefore passing over the observations which have been made on that part of the subject, I shall confine myself to the single question: Is this a legal transaction in a neutral, being the transaction of a Papenberg ship carrying Dutch cheeses from Amsterdam to Brest, or Morlaix (it is said) but certainly to Brest? or as it may be otherwise described, the transaction of a neutral carrying a cargo of provisions, not the product and manufacture of his own country, but of the enemy's ally in the war—of provisions which are a capital ship's store—and to the great port of naval equipment of the enemy.

If I adverted to the state of Brest at this time, it might be no unfair addition to the terms of the description, if I noticed, what was notorious to all Europe at this time, that there was in that port a considerable French fleet in a state of preparation for sallying forth on a hostile expedition; its motions at that time watched with great anxiety by a British fleet which lay off the harbour for the purpose of defeating its designs. Is the carriage of such a supply, to such a place, and on such an occasion, a traffic so purely neutral, as to subject the neutral trader to no inconvenience?

If it could be laid down as a general position, in the manner in which it has been argued, that cheese being a provision is universally contraband, the question would be readily answered: but the Court lays down no such position. The catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations; owing to particular circumstances, the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir R. Wiseman, the then King's Advocate, upon a formal reference made to him, that by the practice of the English Admiralty, corn, wine, and oil, were liable to be deemed contraband. "I do agree," says he, reprobating the regulations that had been published, and observing that rules are not to be so hardly laid down as to press upon neutrals, "that corn, wine, and oil, will be deemed contraband."

These articles of provisions then were at that time confiscable, according to the judgment of a person of great knowledge and experience in the practice of this Court. In much later times many other sorts of provisions have been condemned as contraband. In 1747, in the *Jonge Andreas*, butter, going to Rochelle, was condemned; how it happened that cheese at the same time was more favourably considered, according to the case cited by Dr. Swabey, I don't exactly know; the distinction appears nice; in all probability the cheeses were not of the species which is intended for ship's use. Salted cod and salmon were condemned in the *Jonge Frederick*, going to Rochelle, in the same year; in 1748, in the *Joannes*, rice and salted herrings were condemned as contraband. These instances shew that articles of human food have been so considered, at least where it was probable that they were intended for naval or military use.

I am aware of the favourable positions laid down upon this matter by Wolfius and Vattel, and other writers of the continent, although Vattel expressly admits that provisions may, under circumstances, be treated as contraband. And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it. The Court must therefore look to the circumstances under which this supply was sent.

Among the circumstances which tend to preserve provisions

from being liable to be treated as contraband, one is, that they are of the growth of the country which exports them. In the present case, they are the product of another country, and that a hostile country; and the claimant has not only gone out of his way for the supply of the enemy, but he has assisted the enemy's ally in the war by taking off his surplus commodities.

Another circumstance to which some indulgence, by the practice of nations, is shewn, is, when the articles are in their native and unmanufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage, and wheat is not considered as so noxious a commodity as any of the final preparations of it for human use. In the present case, the article falls under this unfavourable consideration, being a manufacture prepared for immediate use.

But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use; or whether they were going with a highly probable destination to military use? Of the matter of fact, on which the distinction is to be applied, the nature and quality of the port to which the articles were going, is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. *Contra*, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful.

In the case of the *Eendragt*, cited for the claimant, the destination was to Bourdeaux; and though smaller vessels of war may be occasionally built and fitted out there, it is by no means a port of naval military equipment in its principal occupation, in the same manner as Brest is universally known to be.

The Court, however, was unwilling in the present case, to conclude the claimant on the mere point of destination, it being alleged that the cheeses were not fit for naval use, but were merely luxuries for the use of domestic tables. It therefore permitted both parties to exhibit affidavits as to their nature and quality. The claimant has exhibited none; but here are authentic certificates from persons of integrity and knowledge, that they are exactly such cheeses as are used in British ships, when foreign cheeses are used at all; and that they are exclusively used in French ships of war.

Attending to all these circumstances, I think myself warranted to pronounce these cheeses to be contraband, and condemn them as such. As, however, the party has acted without dissimulation in the case, and may have been misled by an inattention to circumstances, to which in strictness he ought to have adverted, as well as by something like an irregular indulgence on which he has relied; I shall content myself with pronouncing the cargo to be contraband, without enforcing the usual penalty of the confiscation of the ship belonging to the same proprietor.

THE IMINA.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1800.
3 C. Robinson, 167.

This was a case of a cargo of ship timber which had sailed July 1798, from Dantzick, originally for Amsterdam, but, was going at the time of capture to Embden, in consequence of information of the blockade of Amsterdam. . . .

Sir W. SCOTT [LORD STOWELL].—This is a claim for a ship taken, as it is admitted, at the time of capture sailing for Embden, a neutral port; a destination on which, if it is considered as the real destination, no question of contraband could arise; inasmuch as goods going to a neutral port, cannot come under the description of contraband, all goods going there being equally lawful. It is contended, however, that they are of such a nature, as to become contraband, if taken on a destination to a hostile port. On this point, some difference of opinion seems to

have been entertained; and the papers which are brought in, may be said to leave this important fact in some doubt. Taking it however, that they are of such a nature as to be liable to be considered as contraband on a hostile destination, I cannot fix that character on them in the present voyage. The rule respecting contraband, as I have always understood it, is, that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations, you cannot generally take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait, till the goods are actually endeavoring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach.

Some argument has been drawn in this case, from the conduct of the owners. It is said, "that they did not consider these articles as contraband; they were sent openly and without suppression or disguise:" perhaps that alone would not avail them. It appears, however, that Amsterdam was declared by this country to be in a State of blockade, a circumstance that would make it peculiarly criminal to attempt to carry a cargo of this nature to that port. The master receives information of this fact at Elsinour, and on consultation with the consul of the nation, to which the cargo belonged, changed his purpose, and actually shaped his course for Embden, to which place he was sailing at the time of capture. I must ask then, was this property taken under such circumstances as to make it subject to the penalty of contraband? Was it taken *in delicto*, in the prosecution of an intention of landing it at a hostile port? Clearly not—But it is said, that in the understanding and intention of the owner it was going to a hostile port; and that the intention on his part was complete, from the moment when the ship sailed on that destination; had it been taken at any period previous to the actual variation, there could be no question, but that this intention would have been sufficient to subject the property to confiscation; but when the variation had actually taken place, however arising, the fact no longer existed. There is no *corpus delicti* existing at the time of capture. In this point of view, I think, the case is very distinguishable from some other cases, in which, on the subject of deviation by the master, *into* a blockaded port, the Court did not hold the cargo, to be necessarily

involved in the consequences of that act. It is argued, that as the criminal deviation of the master did not there immediately implicate the cargo; so here, the favourable alteration cannot protect it, and that the offence must in both instances, be judged by the act and designs of the owner. But in those cases there *was* the guilty act, really existing at the time of capture; both the ship and cargo were taken *in delicto*; and the only question was, to whom the *delictum* was to be imputed; if it was merely the offence of the master, it might bind the owner of the ship, whose agent he was; but the court held that it would be hard to bind the owners of the cargo, by acts of the master, who is not *de jure* their agent, unless so specially constituted by them. In the present instance, there is no existing *delictum*. In those cases the criminal appearance, which did exist, was purged away, by considering the owners of the cargo not to be *necessarily* responsible for the act of the master: but here there is nothing requiring any explanation: The cargo is taken on a voyage to a neutral port. To say, that it is nevertheless exposed to condemnation, on account of the original destination, as it stood in the mind of the owners, would be carrying the penalty of contraband further than it has been ever carried by this, or the superior court. If the capture had been made a day before, that is, before the alteration of the course, it might have been different; but however the variation has happened, I am disposed to hold, that the parties are entitled to the benefit of it; and that under that variation the question of contraband does not at all arise. I shall decree restitution; but as it was absolutely incumbent on the captors to bring the cause to adjudication, from the circumstance of the apparent original destination, I think they are fairly entitled to their expenses.

Restitution. Captor's expenses decreed.

THE PETERHOFF.

SUPREME COURT OF THE UNITED STATES. 1866.
5 Wallace, 28.

[The facts and the preceding parts of the opinion may be found *ante*, 656.]

The CHIEF JUSTICE [CHASE] delivered the opinion of the court. . . .

Thus far we have not thought it necessary to discuss the question of actual destination beyond Matamoras. . . . Destination in this case becomes specially important only in connection with the question of contraband.

And this brings us to the question: was any portion of the cargo of the Peterhoff contraband?

The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Lawrence's Wheaton, 772-6, note; The Commercen, 1 Wheaton, 382; Dana's Wheaton, 629, note; Parsons', Mar. Law, 93-4. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

A considerable portion of the cargo of the Peterhoff was of the third class, and need not be further referred to. A large portion, perhaps, was of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and cannot therefore be treated as contraband. Another portion was, in our judgment, of the first class, or, if of the second, destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness, and of articles described in the invoices as "men's army bluchers," "artillery boots," and "government regulation gray blankets." These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war. They make part of the necessary equipment of an army.

It is true that even these goods, if really intended for sale in the market of Matamoras, would be free of liability: for con-

traband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity.

And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture, though primarily destined to Matamoras.

We are obliged to conclude that the portion of the cargo which we have characterized as contraband must be condemned.

And it is an established rule that the part of the cargo belonging to the same owner as the contraband portion must share its fate. This rule is well stated by Chancellor Kent, thus: "Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the invoice of any particular article is not usually admitted, to exempt it from general confiscation."

So much of the cargo of the *Peterhoff*, therefore, as actually belonged to the owner of the artillery harness, and the other contraband goods, must be also condemned. . . .

NOTE.—The practice of nations with regard to the subject of contraband has been a fruitful source of controversy between belligerents and neutrals, for on this subject their interests are in direct opposition. Changes in methods of warfare necessarily lead to the extension of the lists of contraband goods, and such extensions are usually opposed by neutrals as an invasion of their rights. An international agreement as to what shall be treated as contraband, similar to that embodied in the Declaration of London, is much to be desired. Such

an agreement, however, if it is to be successful, must be in closer accord with the actual methods of war than is the Declaration of London, which for instance provides that raw cotton and rubber, both of which are extensively used in war, shall never be declared contraband. As the Declaration of London was not ratified, it was not binding on the parties to the Great War, and many of the articles enumerated in the free list of the Declaration were included in the lists of contraband issued by the belligerents.

The cases dealing with the question as to whether particular articles are contraband are legion. Among the many decisions the following may be noted: The *Staadtb Embden* (1798), 1 C. Robinson, 26, The *Charlotte* (1804), 5 Ib. 305 (masts); The *Jonge Tobias* (1799), 1 Ib. 329, The *Maria* (1799), 1 Ib. 340, The *Twee Juffrowen* (1802), 4 Ib. 242, The *Schooner Bird* (1903), 38 Ct. Cl. 228 (pitch and tar); The *Neptunus* (1800), 3 C. Robinson, 108 (cordage and sail cloth); The *Endrought* (1798), 1 Ib. 22, The *Twende Brodre* (1801), 4 Ib. 33 (spars, rudders and ship timbers); The *Ringende Jacob* (1798), 1 Ib. 89, The *Gesellschaft Michael* (1802), 4 Ib. 94, The *Apollo* (1802), 4 Ib. 158, The *Evert* (1803), 4 Ib. 354, (hemp); The *Charlotte* (1804), 5 Ib. 305 (copper for the sheathing of vessels); The *Richmond* (1804), 5 Ib. 325 (a ship so constructed as to be convertible into a privateer); The *International* (1871), 3 L. R. Ad. & Eccl. 321 (telegraph cables); The *Bermuda* (1866), 3 Wallace, 514 (printing presses, paper, and postage stamps); *United States v. Diekelman* (1876), 92 U. S. 520 (money, silver plate, bullion); The *Styria v. Morgan* (1902), 186 U. S. 1 (sulphur); The *Schooner Atlantic* (1901), 37 Ct. Cl. 17, (1904), 39 Ib. 193, The *Brig Juno* (1903), 38 Ib. 465, The *Brig Rensalaer* (1913), 49 Ib. 1 (horses); *Turkish Moneys Taken at Mudros* (Malta, 1916), 2 Br. & Col. P. C. 336 (money); The *Katwijk* (1915), L. R. [1916] P. 177 (iron ore); The *Kronprins Gustaf* (1919), L. R. [1919] P. 182 (coffee).

Attempts to declare foodstuffs contraband have provoked sharp controversies. There are only three instances prior to the Great War in which provisions have been treated as absolute contraband—in the early part of the Napoleonic wars; in the war between France and China in 1885, when France declared rice absolute contraband; and in 1905, when Russia made a similar declaration. For an account of the protests against the declarations of France and Russia, see Moore, *Digest*, VII, sec. 1253. For the practice of Russia and Japan as to contraband in the war between those two Powers, see Smith and Sibley, ch. xiii; Hershey, *The International Law and Diplomacy of the Russo-Japanese War*, and Cobbett, *Cases and Opinions*, II, 432. For the contraband lists of the Declaration of London, see Wilson, *Handbook*, 576, and Hershey, *Essentials*, 489. For the lists adopted at various times by various countries, see Moore, *Digest*, VII, sec. 1251. For the lists of the Allies in the Great War, see Pyke, *The Law of Contraband of War*, Appendix C.

Some of the most important cases discussing the question of food as contraband are The *Jonge Margaretha* (1799), 1 C. Robinson, 189; The *Edward* (1801), 4 Ib. 68; The *Commercen* (1816), 1 Wheaton,

382; Hooper, *Adm., v. United States* (1887), 22 Ct. Cl. 408; *The Brig Sally* (1915), 50 Ib. 129. In the discussion between the British and American governments growing out of the seizure of the *Mashona* and other vessels in the Boer war, the Marquis of Salisbury said:

Foodstuffs with a hostile destination can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used. It must be shown that this was in fact their destination at the time of seizure.

Moore, *Digest*, VII, 685.

In the Great War, in which whole populations had such a direct relation to the contest that a line between combatants and non-combatants could not logically be drawn, the reason for the distinction between absolute and conditional contraband disappeared, and the British and French Governments therefore abolished it. The British Foreign Office issued the following explanation, quoted in Garner, II, 287:

The circumstances of the present war are so peculiar that His Majesty's Government consider that for practical purposes the distinction between the two classes of contraband has ceased to have any value. So large a proportion of the inhabitants of the enemy country are taking part, directly or indirectly, in the war that no real distinction can now be drawn between the armed forces and the civilian population. Similarly, the enemy government has taken control, by a series of decrees and orders, of practically all the articles in the list of conditional contraband, so that they are now available for government use. So long as these exceptional conditions continue our belligerent rights with respect to the two kinds of contraband are the same and our treatment of them must be identical.

As to the reason for according to belligerents the right to seize contraband on the way to the enemy, a high tribunal has said:

The transportation of contraband articles to one of the belligerents is in itself an assault for the time being upon the other belligerents, in the fact that it may furnish them with the weapons of war and thereby increase the resources of their power as against their adversary; and for that reason, upon the broad ground of self-preservation incident to nations as well as individuals, the parties against whom the quasi assault is made have the right to defend themselves against the threatened blow by seizing the weapon before it reaches the possession and control of their enemy. The seizure of contraband is not only punishment, but it is also prevention, and the paramount purpose of its exercise is prevention, just as in self-defense on the part of persons it is to protect; but when the act is accomplished, the damage suffered, and the

danger passed, then the incidents of self-defense cease. The extent to which the right to seize may be carried in its effect upon other property belonging to the offending party depends upon a variety of circumstances and conditions. The effect of the seizure may be confined to the contraband articles alone, but may extend beyond those to other property of the guilty party by way of punishment incident to the wrong of carrying contraband.

The Sloop *Ralph* (1904), 39 Ct. Cl. 204, 207-208.

An excellent treatment of the subject of contraband is Pyke, *The Law of Contraband of War*. See also The Kronprinsessen Margareta (1920), L. R. [1921] 1 A. C. 486, where the doctrine of infection is discussed; Atherley-Jones, ch. i; Bentwich, *The Declaration of London*; Bentwich, *The Law of Private Property in War*, chs. viii, ix; Kleen, *De la Contrebande de Guerre*; Moore, "Contraband of War," American Philosophical Society, *Proceedings*, LI, 203; *Int. Law Topics*, 1905, 21; *Int. Law Situations*, 1911, 99, 111; Westlake, II, ch. x; Wilson, *Handbook*, ch. xxiv; Randall, "History of the Law of Contraband of War," *Law Quar. Rev.*, XXIV, 316, 449; Garner, II, ch. xxxii; Bonfils (Fauchille), sec 1537; Cobbett, *Cases and Opinions*, II, 421; Hyde, II, 572; Moore, *Digest*, VII, ch. xxvi.

SECTION 2. CONTRABAND PERSONS,

YANGTSZE INSURANCE ASSOCIATION v. INDEMNITY MUTUAL MARINE ASSURANCE COMPANY.

KING'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE OF ENGLAND.
1908.

Law Reports [1908] 1 K. B. 910.

[In the course of the war between Russia and Japan, the plaintiff underwrote a policy of insurance for £18,000 on the steamer *Nigretia*, and reinsured a part of their risk by a policy for £15,000 underwritten by the defendant. Both policies provided "warranted no contraband of war." The *Nigretia*, while carrying two Russian naval officers who had assumed German names, was captured by a Japanese cruiser and condemned by the Prize Court of Sasebo on the ground that it was "transporting contraband persons." The plaintiffs paid or compounded on the original policy as a total loss and then brought action against the defendant for indemnification on the policy of re-insurance. The defendant pleaded that the transportation of

the Russian naval officers was a breach of the proviso "warranted no contraband of war."']

BIGHAM, J. read the following judgment:

This is an action brought on a policy of marine insurance effected by the plaintiffs with the defendants, which contained a warranty "no contraband of war." The only question to be determined is whether the defendants have proved a breach of the warranty so as to relieve them from liability. (The learned judge then stated the facts as above set out, and proceeded as follows:—) The defendants say they are not liable, because there has been a breach of the warranty "no contraband of war on basis of cable dated 31 October, 1904"; and the question resolves itself into this: Are contraband persons contraband of war within the meaning of the warranty? I am of opinion that they are not. "Contraband of war" is an expression which in ordinary language is used to describe certain classes of material, and does not cover human beings. Many text-writers on international law have no doubt used the expression "contraband persons," but I think I am right in saying that such words are not to be found in any English case, and certainly not in such connection as to shew that they describe a class of contraband of war. The most recent text-writers treat persons as outside any accepted definition of contraband. The transport of "contraband persons" may no doubt in some cases involve the same consequences to the ship as the carriage of contraband, but so may other acts on the part of the ship, as, for instance, transmitting information to the enemy. It would in my opinion be wrong to say that, because the same results may follow in the one case as in the other, therefore the two cases are identical and may be covered by one definition. The Japanese Court carefully avoided describing these officials as contraband of war, and used the somewhat novel, but for their purpose sufficient, expression "contraband persons." The view which I take of this matter is well expressed in the 5th edition of the late Mr. Hall's Treatise on International Law at p. 673, where he says: "With the transport of contraband merchandise is usually classed analogically that of despatches bearing on the conduct of the war, and of persons in the service of a belligerent. It is, however, more correct and not less convenient to place adventures of this kind under a distinct head, the analogy which they possess to the carriage of articles contraband of war being always remote.

They differ from it in some cases by involving an intimacy of connection with the belligerent which cannot be inferred from the mere transport of contraband of war, and in others by implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to. When they are of the former character they may be undertaken for profit alone, but they are not in the way of mere trade. The neutral individual is not only taking his goods for sale to the best market, irrespectively of the effect which their sale to a particular customer may have on the issue of the war, but he makes a specific bargain to carry despatches or persons in the service of the belligerent for belligerent purposes; he thus personally enters the service of the belligerent, he contracts as a servant to perform acts intended to affect the issue of the war, he makes himself in effect the enemy of the other belligerent. In doing so he does not compromise the neutrality of his own sovereign, because the non-neutral acts are either as a matter of fact done beyond the territorial jurisdiction of the latter, or if initiated within it, as sometimes is the case in carrying despatches, they are of too secret a nature to be, as a general rule, known or prevented. Hence the belligerent is allowed to protect himself by means analogous to those which he uses in the suppression of contraband trade. He stops the trade by force, and inflicts a penalty on the neutral individuals. The real analogy between carriage of contraband and acts of the kind in question lies not in the nature of the acts, but in the nature of the remedy applicable in respect of them. When the acts done are of the second kind, the belligerent has no right to look upon them as being otherwise than innocent in intention. . . . When . . . a neutral in the way of his ordinary business holds himself out as a common carrier, willing to transport everybody who may come to him for a certain sum of money from one specified place to another, he cannot be supposed to identify himself specially with belligerent persons in the service of the state who take passage with him." A little further on, at p. 682, when examining the terms of the despatches which passed between Great Britain and the United States of America in connection with the Trent case, Mr. Hall points out that, whereas Admiralty Courts have power to try claims to contraband goods, they have no power to try claims concerning contraband persons; and he adds: "To say that Admiralty Courts

have no means of rendering a judgment in favour of or against persons alleged to be contraband, or of determining what disposition is to be made of them, is to say that persons have not been treated as contraband. If they are contraband the courts must have power to deal with them."

I agree that my interpretation makes it difficult to say to what the warranty would apply, having regard to the fact that the policy already contained a warranty that the cargo should consist of kerosene only; but this difficulty ought not, in my opinion, to induce me to depart from what I am satisfied is the plain meaning of the words, and the sense in which they are always understood among underwriters and merchants.

Judgment for the plaintiffs.

NOTE.—The term contraband persons is open to serious objections, but nevertheless it is employed by some writers of repute. See Phillimore (3rd Ed.), III, 459; Creasy, *First Platform of International Law*, 631; Bluntschli, secs. 815-817; Calvo (2nd Ed.), II, 494. The overwhelming weight of authority, however, confines the term contraband to goods. The most notable controversy in which the question was involved was that which grew out of the stopping of the British steamer *Trent* and the removal therefrom of the Confederate commissioners Mason and Slidell. The act was unwarranted, but in response to the British demand for their surrender, Secretary Seward, in his letter of December 26, 1861, attempted to justify their capture on the ground that they were contraband or analogues of contraband. He admitted however that the captor, in failing to bring the vessel before a prize court, had not complied with the requirements of international law. But even if that had been done, he said, the court could only have passed upon the validity of the capture of the vessel, thus leaving to diplomacy the determination of the status and disposition of the captured persons. Secretary Seward thus found himself confronted by the position taken by the United States in its long controversy with Great Britain as to the impressment of seamen on American vessels, and he finally concluded that in demanding the surrender of Mason and Slidell Great Britain was only adopting the principle for which the United States had always contended. "We are asked," he said, "to do to the British nation just what we have always insisted all nations should do to us." Throughout this negotiation, Secretary Seward confused the notion of contraband persons with the notion of unneutral service. Captain Wilkes, who made the capture, was more discriminating. He said, "There was no doubt I had the right to capture vessels with *written* dispatches. . . . I then considered them [the two commissioners] as the embodiment of despatches." See Marquardsen, *Der Trent-Fall*; Harris, *The Trent Affair*; Cobbett, *Cases and Opinions*, II, 454; Hyde, II, 636; Moore, *Digest*, VII, 626, 763. For General Butler's application of the term contraband to the slaves who took refuge in his Camp, see *Butler's Book*, 259.

SECTION 3. PENALTY FOR THE CARRIAGE OF CONTRABAND.

THE NEUTRALITET.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1861.

3 C. Robinson, 295.

This was a case of a Danish ship taken with a cargo of tar on a voyage from Archangel to Dordrecht. The ship had been a Dutch vessel, and was asserted to have been purchased by Mr. Schultz of Altona. She then went from Holland to Altona, and was from thence sent on to Archangel, to carry a cargo to Dordrecht, under a charter party made by the asserted owner.

Judgment,—Sir W. SCOTT [LORD STOWELL]—The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise, and it cannot be denied, that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has however introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscable for that act: But this rule is liable to exceptions:—Where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one. The circumstances of the present case compose a case of exception also; for it is a case of singular misconduct on the part of the asserted ship owners. They are subjects of Denmark, and as such are under the peculiar obligations of a treaty not to carry goods of this nature for the use of the enemies of Great Britain.

A reference has been made to ancient cases of Dantzick ships, which were restored, though taken carrying masts to Cadiz. The particulars of those cases are not very exactly stated; but they were clearly the cases of proprietors exporting the produce of their own territory or neighboring parts, without the breach of any obligation but such as the general law of nations imposed. In this instance the ship was freighted at Altona, to go to

Archangel, for the purpose of carrying a cargo of tar to Holland, which is a commerce expressly prohibited by the Danish treaty. Tar is an article which a Danish ship cannot lawfully carry to an enemy's port, even when it is the produce and manufacture of Denmark. This ship goes to a foreign port, to effect that which she is prohibited from doing, even for the produce of her own country: in this respect, throwing off the character of a Danish ship by violating the treaties of her country; and all this is done, with the full privity of the asserted owner, who is the person entering into the charter party. In such a case as the present, the known ground on which the relaxation was introduced, the supposition that freights of noxious or doubtful articles might be taken, without the personal knowledge of the owner entirely fails; and the active guilt of the parties is aggravated by the circumstances, of its being a criminal traffick in foreign commodities, and in breach of explicit and special obligations. The confiscation of a ship so engaged, will leave the general rule still untouched, that the carriage of contraband works a forfeiture of freight and expenses, but not of the ship.

Ship condemned.

THE HAABET.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1800.
2 C. Robinson, 174.

This was a case arising on an objection to a report of the registrar and merchants respecting the allowance of insurance, as part of the price of a cargo of wheat, going from Altona to Cadiz, but seized and brought into this country, and bought by Government. The demand of the claimant, Mr. Peschie of Copenhagen, had been disallowed in the report, on the ground that the insurance had not actually been made. . . .

SIR WM. SCOTT [LORD STOWELL]. . . . The question is, Whether there is any reasonable ground for me to pronounce that the Registrar and merchants have disallowed a just demand, in disallowing a charge of insurance which had not been made. It has been argued that this charge ought to have been allowed, because it is usually so allowed in the dealings of merchants with each other: I am not clear that this is a necessary

consequence, for it is surely no certain rule that in all cases where a cargo is taken *jure belli* but for the mere purpose of preemption, that it is to receive a price calculated exactly in the same manner, and amounting precisely to the same value, as it would have done, if it had arrived at its port of destination in the ordinary course of trade.

The right of taking possession of cargoes of this description, *Commeatus* or Provisions, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations; the ancient practice of Europe, or at least of several maritime states of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject only to a right of preemption, that is, to a right of purchase upon a reasonable compensation to the individual whose property is thus diverted. I have never understood that, on the side of the belligerent, this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected, on just grounds, to have a concealed destination of that kind; or that on the side of the neutral, the same exact compensation is to be expected, which he might have demanded from the enemy in his own port; the enemy may be distressed by famine, and may be driven by his necessities to pay a famine price for the commodity if it gets there; it does not follow that acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established, that such a purchase shall be regulated exactly upon the same terms of profit, which would have followed the adventure, if no such exercise of war had intervened; it is a reasonable indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter, and the expences which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms; but certainly the capturing nation does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust cap-

tors; for these are not unjust captures, but authorized exercises of the rights of war. . . .

Upon the whole, I see no sufficient reason to pronounce that the Registrar and merchants have adopted a wrong measure of value in disallowing the charge of insurance. . . .

Report confirmed.

EDWARD CARRINGTON AND OTHERS v. THE MERCHANTS' INSURANCE COMPANY.

SUPREME COURT OF THE UNITED STATES. 1834.
8 Peters, 495.

[In November, 1824, while open hostilities existed between Spain and the new governments of Chili and Peru, the defendants underwrote a policy of insurance for the plaintiffs covering property of the latter on board the ship General Carrington. The policy, which ran for twelve months from June 5, 1824, was against the usual perils, and contained this clause: "It is also agreed that the assurers shall not be answerable for any charge, damage or loss which may arise in consequence of seizure or detention, for or on account of illicit or prohibited trade, or trade in articles contraband of war." The ship sailed from Providence, Rhode Island, cleared for the Sandwich Islands and Canton, but was immediately bound for Valparaiso, Chili, which port she was to enter under a plea of want of water, with such ulterior destination as was stated in her orders. This was the usual mode of clearance at that time for ships bound to Chili and Peru. The vessel carried a large amount of munitions of war in her cargo, the most of which were disposed of at Valparaiso before the policy of insurance had attached. The vessel then proceeded to Quilca, Peru, where she was seized by the Spanish authorities and condemned for trading in contraband of war at Valparaiso. The question at issue is the liability of the insurance company under the policy. The Circuit Court being divided in opinion certified certain questions to the Supreme Court for a final decision thereon.]

MR. JUSTICE STORY delivered the opinion of the court. . . .

The second question is, whether, assuming the other facts to be as stated and alleged above, and taking the authority of the

seizing vessel to be such as the plaintiffs allege (that is to say, of an armed vessel, fitted out and commissioned at Callao by Rodil [military commander]), there was a legal and justifiable cause for the seizure of the General Carrington and her cargo. The third is precisely the same in terms, except taking the authority of the armed vessel to be such as the defendants allege (that is to say, to be an armed vessel sailing under the royal Spanish flag, and acting by the royal authority of Spain).

Both these questions present the same general point, whether there was, under the circumstances of the case, a legal and justifiable cause of the seizure and detention of the ship and her cargo. The facts material to be taken into consideration in ascertaining this point are, that the ship, when seized, had not landed all her outward cargo, but was still in the progress of the outward voyage originally designated by the owners; that she sailed on that voyage from Providence with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with a false destination and false papers, which yet accompanied the vessel; that the contraband articles had been landed, before the policy, which is a policy on time, designating no particular voyage, had attached; that the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and that the alleged cause of the seizure and detention was, the trade in articles contraband of war by the landing of the powder and muskets already mentioned.

If by the principles of the law of nations there existed under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods; then the question must be answered in the affirmative, that there was a legal and justifiable cause.

According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects them, if captured, *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter, only when there has been some actual co-operation, on their part, in a meditated fraud upon the belligerents, by covering up the voyage under false papers, and with a false destination. This is the general

doctrine when the capture is made *in transitu*, while the contraband goods are yet on board. But when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return voyage, although the latter may be the proceeds of the contraband. And the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established, that it exists only in favour of neutrals, who conduct themselves with fairness and good faith in the arrangements of the voyage. If, with a view to practice a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers; and with a false destination, the mere deposit of the contraband in the course of the voyage, is not allowed to purge away the guilt of the fraudulent conduct of the neutral. In the case of the *Franklin*, in 1801, 3 Rob. 217, Lord Stowell said, "I have deliberated upon this case, and desire it to be considered as the settled rule of law received by this court, that the carriage of contraband with a false destination, will make a condemnation of the ship, as well as the cargo." Shortly afterwards, in the case of the *Neutralitet*, 1801, 3 Rob. R. 295, he added, "The modern rule of the law of nations is certainly, that the ship shall not be subject to condemnation for carrying contraband goods. The ancient practice was otherwise; and it cannot be denied that it was perfectly justifiable in principle. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose, cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscated for that act. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient rule." The cases in which this language was

used were cases of capture upon the outward voyage. (See also the *Edward*, 4 Rob. R. 68.) The same doctrine was afterwards held by the same learned judge to apply to cases, where the vessel had sailed with false papers, and a false destination upon the outward voyage, and was captured on the return voyage. (See the *Nancy*, 3 Rob. 122; the *Christianberg*, 6 Rob. 376.) And, finally, in the cases of *The Rosalia* and *The Elizabeth*, in 1802, (4 Rob. R., note to table of cases,) the lords of appeal in prize cases held, that the carriage of contraband outward with false papers will affect the return cargo with condemnation. These cases are not reported at large. But in the case of the *Baltic*, 1 Acton's R. 25, and that of the *Margaret*, 1 Acton's R. 333, the lords of appeal deliberately reaffirmed the same doctrine. In the latter case Sir William Grant, in pronouncing the judgment of the court said: "The principle upon which this and other prize courts have generally proceeded to adjudication in cases of this nature (that is, where there are false papers), appears simply to be this; that if a vessel carried contraband on the outward voyage, she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contraband. Hence we must pronounce against this appeal; the sentence (of condemnation) of the court below being perfectly valid and consistent with the acknowledged principles of general law."

We cannot but consider these decisions as very high evidence of the law of nations, as actually administered; and in their actual application to the circumstances of the present case, they are not, in our judgment, controlled by any opposing authority. Upon principle, too, we think, that there is great soundness in the doctrine, as a reasonable interpretation of the law of nations. The belligerent has a right to require a frank and *bona fide* conduct on the part of neutrals in the course of their commerce in times of war; and if the latter will make use of fraud, and false papers, to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation. The taint of the fraud travels with the party and his offending instrument during the whole course of the voyage, and until the enterprise has, in the understanding of the party himself, completely terminated. There are many analogous cases in the prize law, where fraud is followed by similar penalties. Thus, if a neutral will cover up enemy's property under false papers, which also cover his own

property, prize courts will not disentangle the one from the other, but condemn the whole as good prize. That doctrine was solemnly affirmed in this court, in the case of the *St. Nicholas*, 1 Wheaton, 417, 3 Cond. Rep. 614.

Upon the whole, our opinion is, that the general question involved in the second and third questions, whether there was a legal and justifiable cause of capture under the circumstances of the present case, ought to be answered in the affirmative. The question, as to the authority of the cruiser to seize, so far as it depends upon her commission, can only be answered in a general way. If she had a commission under the royal authority of Spain, she was beyond question entitled to make the seizure. If Rodil had due authority to grant the commission, the same result would arise. If he had no such authority, then she must be treated as a non-commissioned cruiser entitled to seize for the benefit of the crown; whose acts, if adopted and acknowledged by the crown or its competent authorities, become equally binding. Nothing is better settled both in England and America, than the doctrine that a non-commissioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a *droit* of the government. (*The Amiable Isabella*, 6 Wheat. Rep. 1, 5 Cond. Rep. 1; *The Dos Hermanos*, 10 Wheat. Rep. 306, 6 Cond. Rep. 109; *The Melomane*, 5 Rob. 41; *The Elsebe*, 5 Rob. 174; *The Maria Françoise*, 6 Rob. 282.) . . .

THE HAKAN.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1917.
Law Reports [1918] A. C., 148.

Appeal from a judgment of the President of the Probate, Divorce, and Admiralty Division (in Prize), . . . [1916] P. 266.

The appellants, a Swedish firm carrying on business at Gothenburg, were the owners of the steamship *Hakan*, which was condemned by a judgment of the President (Sir Samuel Evans) on the ground that she was captured while carrying a contraband cargo.

The facts appear from the judgment of their Lordships. . . .

LORD PARKER OF WADDINGTON. The Swedish steamship *Hakan*, the subject of this appeal, was captured at sea by H. M. S. *Nonsuch* on April 4, 1916, having sailed the same day from *Haugesund* in Norway on a voyage to *Lübeck* in Germany with a cargo of salted herrings. Foodstuffs had as early as August 4, 1914, been declared to be conditional contraband. The writ in the present proceedings claimed condemnation of both ship and cargo, the former on the ground that it was carrying contraband goods and the latter on the ground that it consisted of contraband goods.

It should be observed that the cargo, being on a neutral ship, was, even if it belonged to enemies, exempt from capture unless it consisted of contraband goods (see the Declaration of Paris).

The cargo owners did not appear or make any claim in the action, although, according to the usual practice of the Prize Court, even enemies may appear and be heard in defence of their rights under an international agreement. The question whether the goods were contraband was, however, fully argued by counsel for the owners of the ship, a Swedish firm carrying on business at *Gothenburg*. The President condemned the cargo as contraband. He also condemned the ship for carrying contraband. The owners of the ship have now appealed to His Majesty in Council. Under these circumstances the first question to be decided is whether the cargo was rightly condemned as contraband, for if it was not there could be no case against the ship.

In their Lordships' opinion, goods which are conditional contraband can be properly condemned whenever the Court is of opinion, under all the circumstances brought to its knowledge, that they were probably intended to be applied for warlike purposes: *The Jonge Margaretha*, 1 C. Rob. 189. The fact alone that the goods in question are on the way to an enemy base of naval or military equipment or supply would justify an inference as to their probable application for warlike purposes. But the character of the place of destination is not the only circumstance from which this inference can be drawn. All the known facts have to be taken into account. The fact that the goods are consigned to the enemy Government, and not to a private individual, would be material. The same would be the case if, though the goods are consigned to a private individual, such individual is in substance or in fact the agent or representative of the enemy Government.

In the present case Lübeck, the port of destination of the goods, is undoubtedly a port used largely for the importation into Germany of goods from Norway and Sweden; but it does not appear whether it is used exclusively or at all as a base of naval or military equipment. On the other hand, it is quite certain that the persons to whom the goods were consigned at Lübeck were bound forthwith to hand them over to the Central Purchasing Company, of Berlin, a company appointed by the German Government to act under the direction of the Imperial Chancellor for purposes connected with the control of the food supplies rendered necessary by the war. The proper inference seems to be that the goods in question are in effect goods requisitioned by the Government for the purposes of the war. It may be quite true that their ultimate application, had they escaped capture, would have been to feed civilians, and not the naval or military forces of Germany; but the general scarcity of food in Germany had made the victualling of the civil population a war problem. Even if the military or naval forces of Germany are never supplied with salted herrings, their rations of bread or meat may well be increased by reason of the possibility of supplying salted herrings to the civil population. Under these circumstances, the inference is almost irresistible that the goods were intended to be applied for warlike purposes, and, this being so, their Lordships are of opinion that the goods were rightly condemned.

The second question their Lordships have to determine relates to the condemnation of the ship for carrying the goods in question. It is, of course, quite clear that if art. 40 of the Declaration of London¹ be applicable, the ship was rightly condemned, inasmuch as the whole cargo was contraband. The Declaration of London has, however, no validity as an international agreement. It was, it is true, provided by the Order in Council of October 29, 1914, that during the present hostilities its provisions should, with certain very material modifications, be adopted and put in force. But the Prize Court cannot, in deciding questions between His Majesty's Government and neutrals, act upon this Order except in so far as the Declaration of London, as modified by the Order, either embodies the international law or contains a waiver in favour of neutrals of the strict rights of the Crown. It is neces-

¹ Art. 40: "A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo."

sary, therefore, to consider the international law with regard to the condemnation of a ship for carrying contraband apart from the declaration of London.

It seems quite clear that at one time in our history the mere fact that a neutral ship was carrying contraband was considered to justify its condemnation, but this rule was subsequently modified. Lord Stowell deals with the matter in *The Neutralitet*, (1801) 3 C. Rob. 295. "The modern rule of the law of nations is, certainly," he says, "that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise; and it cannot be denied, that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscable for that act. But this rule is liable to exceptions:—where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one."

It is to be observed that Lord Stowell does not say that the particular cases he refers to are the only exceptions to the modern rule. On the contrary, his actual decision in *The Neutralitet* creates a third exception. It should be observed, too, that in a later part of his judgment he states the reason for the modification of the ancient rule to be the supposition that noxious or doubtful articles might be carried without the personal knowledge of the owner of the ship. He held in the case before him that this ground for the modification of the rule entirely failed, so that the ancient rule applied. The reasoning is sound. For if the ancient rule was modified because of the possible want of knowledge on the part of the shipowner, it is perfectly logical to treat actual knowledge on the part of the shipowner as a good ground for excepting any particular case from the modern rule. Knowledge will also explain the two main exceptions to which Lord Stowell refers: If the shipowner also owns the contraband cargo, he must have this knowledge; and if he sails under a false destination or with false papers, it is quite legitimate to infer this knowledge from his conduct. In

his earlier decision in *The Ringende Jacob* (1798), 1 C. Rob. 89, Lord Stowell had stated the modern rule to be that the carrying of contraband is attended only with loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances. If by malignant and aggravating circumstances Lord Stowell meant only circumstances from which knowledge of the character of the cargo might be properly inferred, the rule thus stated does not differ from that laid down in the subsequent case of *The Neutralitet*. But the words used have by some writers been taken as indicating that, in Lord Stowell's opinion, besides knowledge of the character of the cargo, there must be on the part of the shipowner some intention or conduct to which the epithets "malignant or aggravating" can be applied in a real as opposed to a rhetorical sense. Any such hypothesis seems, however, to vitiate the reasoning of Lord Stowell in *The Neutralitet*. Sailing under a false destination or false papers may possibly be called malignant or aggravating. There is not only the knowledge of guilt, but an attempt to evade its consequences. But in the case of the shipowner who also owns the contraband on board his ship it is difficult to see where the malignancy or aggravation lies, if it be not in the knowledge of the character of the goods on board. If it be malignant or aggravating on the part of the owner of the goods to consign them to the enemy, it must be equally malignant and aggravating on the part of the shipowner knowingly to aid in the transaction.

Nevertheless, it was this construction of Lord Stowell's words in *The Ringende Jacob* rather than the reasoning on which his decision in *The Neutralitet* case was based that was adopted by the Supreme Court of the United States in the case of *The Bermuda* (1865), 3 Wall. 514, 555. In that case Chase C. J., in delivering the opinion of the Court, says as to the relaxation of the ancient rule: "It is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or, at least, without intent on his part to take hostile part against the country of the captors; and it must be recognized and enforced in all cases where that presumption is not repelled by proof. The rule, however, requires good faith on the part of the neutral, and does not protect the ship where good faith is wanting. . . . Mere consent to transportation of contraband will not always or usually be

taken to be a violation of good faith. There must be circumstances of aggravation. The nature of the contraband articles and their importance to the belligerent, and the general features of the transaction, must be taken into consideration in determining whether the neutral owner intended or did not intend, by consenting to the transportation, to mix in the war."

Passing from the English and American decisions to the views which were at the commencement of the present hostilities entertained by the Prize Courts or jurists of other nations, we find what at first sight appears to be considerable divergence of opinion. If, however, the true principle be that knowledge of the character of the cargo is a sufficient ground for depriving a shipowner of the benefit of the modern rule, this divergence is more apparent than real. It reduces itself to a difference of opinion as to the circumstances under which the knowledge may be inferred, and if it be remembered that knowledge on the part of the shipowner of the character of the cargo must be largely a matter of inference from a great variety of circumstances, such difference of opinion is readily intelligible.

Referring, for example, to the view entertained in Holland their Lordships find that, although the ship is *prima facie* confiscable if an important part of the cargo be contraband, proof that the master or the charterers could not have known the real nature of the cargo will secure the ship's release. In other words, the proportion of the contraband to the whole cargo raises a presumption of knowledge which may be rebutted. Again, according to the views held in Italy, the ship carrying contraband is liable to confiscation only where the owner was aware that his vessel was intended to be used for the carrying of contraband. Here knowledge is made the determining factor, the manner in which knowledge is to be proved or inferred being left to the general law. Again, according to the views entertained in Germany, a ship carrying contraband can only be confiscated if the owner or the charterer of the whole ship or the master knew or ought to have known that there was contraband on board, and if that contraband formed more than a quarter of the cargo. Here also knowledge is made the determining factor, though there is a concession to the neutral if the proportion of the contraband to the whole cargo be sufficiently small. Once more, in France the test of the right to confiscate is whether or not the contraband is three-fourths in value of the whole cargo. This view may be looked on as defining the circumstances in

which an irrebuttable inference of knowledge arises. The views entertained in Russia and Japan are similarly explicable. In their Lordships' opinion the principle underlying all these views is the same. There can be no confiscation of the ship without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo, but in some cases the inference as to knowledge arising from the extent to which the cargo is contraband cannot be rebutted, while in others it can, and in some cases, even where there is the requisite knowledge, the contraband must bear a minimum proportion to the whole cargo.

It follows that the views entertained by foreign nations point to knowledge of the character of the goods being alone sufficient for condemnation of a vessel for carrying contraband; in other words, they support the principle to be derived from the reasoning in *The Neutralitet* rather than the principle which has been deduced from the dictum in *The Ringende Jacob* and developed in *The Bermuda*. It should be observed that both Westlake and Hall agree that knowledge is alone sufficient to justify confiscation: see Westlake, *International Law (War)*, 2nd ed., p. 291; Hall, *International Law*, 6th ed., p. 666.

Their Lordships consider that in this state of the authorities they ought to hold that knowledge of the character of the goods on the part of the owner of the ship is sufficient to justify the condemnation of the ship—at any rate, where the goods in question constitute a substantial part of the whole cargo.

In the light of what has been said as to the rule of international law their Lordships will now proceed to consider the special facts of this case. The owners of the ship are a Swedish firm carrying on business at Gothenburg. On January 8, 1916, they chartered the ship to a German firm of fish dealers for a period of six weeks from the time when the vessel was placed at charterers' disposal, with power for the charterers to prolong this period up to May 16, 1916. The voyages undertaken by the charterers were to be from Scandinavian to German Baltic ports. It must have been quite evident to the owners that the ship would be used for the importation of fish into Germany. They must also have known that foodstuffs were conditional contraband. It is almost inconceivable that they did not also know of the food difficulties in Germany and of the manner in which the German Government had in effect requisitioned salted herrings to meet the exigencies of the war. They had an opportunity

in the Court below of establishing their want of knowledge if it existed, but they did not attempt to do so. The inference that they did in fact know that the vessel would be used for the purpose for which it was used is irresistible. If knowledge of the character of the goods be the true criterion as to confiscability, the vessel was rightly condemned.

Even on the hypothesis that something beyond mere knowledge of the character of the cargo is required, something which may be called "malignant or aggravating" within the principles of *The Ringende Jacob* or *The Bermuda* decisions, that something clearly exists in the present case. A shipowner who lets his ship on time charter to an enemy dealer in conditional contraband for the purposes of this trade at a time when the conditional contraband is vitally necessary to and has been requisitioned by the enemy Government for the purpose of the war is, in their Lordships' opinion, deliberately "taking hostile part against the country of the captors" and "mixing in the war" within the meaning of those expressions as used by Chase C. J. in *The Bermuda*.

In their Lordships' opinion, the appeal fails and should be dismissed with costs.

NOTE.—The penalties for engaging in contraband traffic vary with the relationship between the cargo and the vessel in which it is found. In no case however do they extend beyond the total loss of both goods and vessel. If the two are the property of the same owner, both may be confiscated, *The Stadt Embden* (1798), 1 C. Robinson, 26. If the two are the property of different owners, usually the cargo alone is confiscated, while the vessel itself is only seized and detained and its loss is confined to freight, *The Ringende Jacob* (1798), 1 C. Robinson, 90; *The Sarah Christina* (1799), 1 Ib. 237; *The Eenrom* (1799), 2 Ib. 1; *The Bermuda* (1866), 3 Wallace, 514. But the utmost good faith is required and any deception, *The Jonge Tobias* (1799), 1 C. Robinson, 329; *The Franklin* (1801), 3 Ib. 217; *The Carolina* (1802), 4 Ib. 256; *The Ranger* (1805), 6 Ib. 125; *The Schooner Betsey and Polly* (1902), 28 Ct. Cl. 30; *The Bawtry* (1904), Takahashi, 659, or spoliation of documents, *The Johanna Emilie* (1854), Spinks, 317; *The Ophelia* (1915), L. R. [1915] P. 129, may lead to the confiscation of the vessel. Takahashi reports nine cases in which the Japanese Prize Courts condemned vessels for the carriage of contraband. In many of them the court adopts the eighteenth-century principle that the mere carriage of contraband exposes the vessel to condemnation. An examination of the facts however shows that in each case the vessel concerned had practiced some form of deception, and the sentence may be sustained on that ground. See Takahashi, 651-709. A vessel's liability to seizure for

the carriage of contraband usually terminates with the deposit of the contraband cargo, *The Frederick Molke* (1798), 1 C. Robinson, 86; *The Sloop Ralph* (1904), 39 Ct. Cl. 204, unless the voyage has been accomplished by means of false or simulated papers, *The Nancy* (1800), 3 C. Robinson, 122; *The Lucy* (1904), 39 Ct. Cl. 221; *The Betsey* (1904), 39 Ib. 452; *The Alwina* (1916), L. R. [1916] P. 131, when, on the return voyage, both the ship and the cargo purchased with the proceeds of the contraband cargo were held liable to capture. On the penalty for carrying contraband, see *The Hakan* (1916), L. R. [1916] P. 266, where the authorities are fully reviewed; *The Maracaibo* (1916), 2 Br. & Col. P. C. 294; *The Hillerod* (1917), L. R. [1918] A. C. 412; Pyke, *The Law of Contraband of War*, ch. xvi; Cobbett, *Cases and Opinions*, II, 430; Hyde, II, 629; Moore, *Digest*, VII, 744.

In the *Sarah Christina* (1799), 1 C. Robinson, 237, 241, which was the case of a Swedish ship carrying pitch and tar to France, Lord Stowell said:

In the practice of this Court there is a relaxation, which allows the carrying of these articles, being the produce of the claimant's country; as it has been deemed a harsh exercise of a belligerent right, to prohibit the carriage of these articles, which constitute so considerable a part of its native produce and ordinary commerce.—But in the same practice, this relaxation is understood with a condition, that it may be brought in, not for confiscation, but for preemption—no unfair compromise, as it should seem, between the belligerent's rights, founded on the necessities of self-defence, and the claims of the neutral to export his native commodities, though immediately subservient to the purposes of hostility.—To entitle the party to the benefit of this rule, a perfect *bona fides* on his part is required.

See also *The Edward* (1801), 4 C. Robinson, 68. In the Great War of 1914-1918, Great Britain freely applied the milder practice of preemption and paid for many cargoes which the strict law would have justified her in confiscating. See Phillipson, *International Law and the Great War*, 338; Pyke, *The Law of Contraband of War*, 224.

CHAPTER XIX.

RETALIATORY MEASURES.

THE FOX AND OTHERS.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1811.
Edwards, 311.

SIR WILLIAM SCOTT [LORD STOWELL].—This was the case of an American vessel which was taken on the 15th November, 1810, on a voyage from Boston to Cherbourg. It is contended, on the part of the captors, that, under the order in council of 26th April, 1809, this ship and cargo, being destined to a port of France, are liable to confiscation. On the part of the claimants it has been replied, that the ship and cargo are not confiscable under the orders in council; first, because these orders have in fact become extinct, being professedly founded upon measures which the enemy had retracted; and secondly, that if the orders in council are to be considered as existing, there are circumstances of equity in the present case, and in the others that follow, which ought to induce the court to hold them exonerated from the penal effect of these orders.

In the course of the discussion a question has been started, what would be the duty of the court under orders in council that were repugnant to the law of nations? It has been contended on one side, that the court would at all events be bound to enforce the orders in council: on the other, that the court would be bound to apply the rule of the law of nations adapted to the particular case, in disregard of the orders in council. I have not observed, however, that these orders in council, in their retaliatory character, have been described in the argument as at all repugnant to the law of nations, however liable to be so described if merely original and abstract. And therefore it is rather to correct possible misapprehension on the subject than from the sense of any obligation which the present discussion imposes upon me, that I observe that this court is bound to ad-

minister the law of nations to the subjects of other countries in the different relations in which they may be placed towards this country and its government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is its unwritten law, evidenced in the course of its decisions, and collected from the common usage of civilized states. At the same time it is strictly true, that by the constitution of this country, the king in council possesses legislative rights over this court, and has power to issue orders and instructions which it is bound to obey and enforce; and these constitute the written law of this court. These two propositions, that the court is bound to administer the law of nations, and that it is bound to enforce the king's orders in council, are not at all inconsistent with each other; because these orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law. They are either directory applications of those principles to the cases indicated in them—cases which, with all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the court itself; or they are positive regulations, consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing.

The constitution of this court, relatively to the legislative power of the king in council, is analogous to that of the courts of common law, relatively to that of the parliament of this kingdom. Those courts have their unwritten law, the approved principles of natural reason and justice—they have likewise the written or statute law in acts of parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large if they were left to the imperfect information which the courts could extract from mere general speculations. What would be the duty of the individuals who preside in those courts if required to enforce an act of parliament which contradicted those principles, is a question which I presume they would not entertain *a priori*, because they will not entertain *a priori* the supposition that any such will arise. In like manner this court will not let itself loose into speculations as to what would be its duty under such an emergency, because it cannot, without extreme indecency, presume that any such emergency will happen; and it is the less disposed

to entertain them, because its own observation and experience attest the general conformity of such orders and instructions to its principles of unwritten law.—In the particular case of the orders and instructions which give rise to the present question, the court has not heard it at all maintained in argument, that as retaliatory orders they are not conformable to such principles—for retaliatory orders they are.—They are so declared in their own language, and in the uniform language of the government which has established them. I have no hesitation in saying that they would cease to be just if they ceased to be retaliatory; and they would cease to be retaliatory, from the moment the enemy retracts, in a sincere manner, those measures of his which they were intended to retaliate.

The first question is, what is the proper evidence for this court to receive, under all the circumstances that belong to the case, in proof of the fact that he has made a bona fide retraction of those measures. Upon that point it appears to me that the proper evidence for the court to receive, is the declaration of the state itself, which issued these retaliatory orders, that it revokes them in consequence of such a change having taken place in the conduct of the enemy. When the state, in consequence of gross outrages upon the law of nations committed by its adversary, was compelled by a necessity which it laments, to resort to measures which it otherwise condemns, it pledges itself to the revocation of those measures as soon as the necessity ceases.—And till the state revokes them, this court is bound to presume that the necessity continues to exist. It cannot without extreme indecency suppose that they would continue a moment longer than the necessity which produced them, or that the notification that such measures were revoked, would be less public and formal than their first establishment. Their establishment was doubtless a great and signal departure from the ordinary administration of justice in the ordinary state of the exercise of public hostility, but was justified by that extraordinary deviation from the common exercise of hostility in the conduct of the enemy. It would not have been within the competency of the court itself to have applied originally such rules, because it was hardly possible for this court to possess that distinct and certain information of the facts to which alone such extraordinary rules were justly applicable. It waited, therefore, for the communication of the facts: it waited likewise for the promulgation of the rules that were to be practically ap-

plied; for the state might not have thought fit to act up to the extremity of its rights on this extraordinary occasion. It might, from motives of forbearance, or even of policy, unmixed with any injustice to other states, have adopted a more indulgent rule than the law of nations would authorize, though it is not at liberty ever to apply a harsher rule than that law warrants. In the case of the Swedish convoy, which has been alluded to, no order or instruction whatever was issued, and the court, therefore, was left to find its way to that legal conclusion which its judgment of the principles of the law led it to adopt. But certainly if the state had issued an order that a rule of less severity should be applied, this court would not have considered it as any departure from its duty to act upon the milder rule which the prudence of the state was content to substitute in support of its own rights. In the present case it waited for the communication of the fact and the promulgation of the rule. It is its duty in like manner to wait for the notification of the fact that these orders are revoked in consequence of a change in the conduct of the enemy.

The edicts of the enemy themselves, obscure and ambiguous in their usual language, and most notoriously and frequently contradicted by his practice, would hardly afford it a satisfactory evidence of any such change having actually and sincerely taken place. The state has pledged itself to make such a notification when the fact happens: it is pledged so to do by its public declarations—by its acknowledged interpretations of the law of nations—by every act which can excite a universal expectation and demand, that it shall redeem such a pledge. Is such an expectation peculiar to this court? most unquestionably not. It is universally felt and universally expressed. What are the expectations signified by the American government in the public correspondence referred to? not that these orders would become silently extinct under the interpretations of this court, but that the state would rescind and revoke them. What is the expectation expressed in the numerous private letters exhibited to the court amongst the papers found on board this class of vessels? not that the British orders had expired of themselves, but that they would be removed and repealed by public authority. If I took upon myself to annihilate them by interpretation, I should act in opposition to the apprehension and judgment of all parties concerned—of the individuals whose property is in ques-

tion, and of the American government itself, which is bound to protect them. . . .

It is incumbent upon me, I think, to take notice of an objection of Dr. Herbert's, to the existence of the orders in council—namely, that British subjects are, notwithstanding, permitted to trade with France, and that a blockade which excludes the subjects of all other countries from trading with ports of the enemy, and at the same time permits any access to those ports to the subjects of the state which imposes it, is irregular, illegal, and null. And I agree to the position, that a blockade, imposed for the purpose of obtaining a commercial monopoly for the private advantage of the state which lays on such blockade, is illegal and void on the very principle upon which it is founded. But, in the first place, (though that is matter of inferior consideration,) I am not aware that any such trade between the subjects of this country and France is generally permitted. Licenses have been granted certainly in no inconsiderable numbers; but it never has been argued that particular licenses would vitiate a blockade. If it were material in the present case, it might be observed, that many more of these licenses had been granted to foreign ships than to British ships, to go from this country to France and to return here from thence with cargoes. But, secondly, what still more clearly and generally takes this matter out of the reach of the objection, is the particular nature and character of this blockade of France, if it is so to be characterized. It is not an original, independent act of blockade, to be governed by the common rules that belong simply to that operation of war. It is in this instance a counteracting, reflex measure, compelled by the act of the enemy, and as such subject to other considerations arising out of its peculiarly distinctive character. France declared that the subjects of other states should have no access to England; England, on that account, declared that the subjects of other states should have no access to France. So far this retaliatory blockade (if blockade it is to be called) is coextensive with the principle: neutrals are prohibited to trade with France, because they are prohibited by France from trading with England. England acquires the right, which it would not otherwise possess, to prohibit that intercourse, by virtue of the act of France. Having so acquired it, it exercises it to its full extent, with entire competence of legal authority: and having so done, it is not for other countries to inquire how far this country may be able to relieve itself fur-

ther from the aggressions of that enemy. The case is settled between them and itself by the principle on which the intercourse is prohibited. If the convenience of this country before this prohibition required some occasional intercourse with the enemy, no justice that is due to other countries requires that such an intercourse should be suspended on account of any prohibition imposed upon them on a ground so totally unconnected with the ordinary principles of a common measure of blockade, from which it is thus distinguished by its retaliatory character.

Things standing as they do before me—all the parties having acted in a manner that leads necessarily to the conclusion that no bona fide revocation of the Berlin and Milan decrees has taken place, I must consider these cases as falling within the range of the British orders in council, and as such they are liable to condemnation.

NOTE.—In *The Snipe and Others* (1812), Edwards, 380, Lord Stowell again considered the retaliatory Orders in Council, and in the course of his opinion he said:

It is matter of universal notoriety that the French ruler published, in November, 1806, a Decree dated at Berlin (from whence it usually takes its title,) by which he declared the British Isles to be in a state of blockade.—That the British Government, in January and November, 1807, published Orders of Blockade, the former prohibiting the trade of neutrals between ports from which the British flag was excluded—the latter imposing a total blockade of those ports. These orders were intended and professed to be retaliatory against France; without reference to that character, they have not, and would not have been defended; but in that character they have been justly, in my apprehension, deemed reconcilable with those rules of natural justice, by which the international communication of independent states is usually governed.

THE STIGSTAD.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1918.
Law Reports [1919] A. C. 279.

Appeal from a judgment of the President of the Admiralty Division (in Prize), [1916] P. 123.

[In retaliation for measures taken by the German Government, the British Government, on March 11, 1915, issued an Order in Council providing that every merchant ship on its way to a port other than a German port and carrying goods with an enemy destination might be required to discharge the goods at a British port. No provision was made for compensation. The Stigstad, a Norwegian vessel bound from a Norwegian port to Rotterdam with iron-ore briquettes belonging to neutrals but destined for Germany, was stopped and required to discharge at a British port. The claimants put in a claim for freight, detention and expenses consequent upon the seizure and discharge. The President, Sir Samuel Evans, allowed the freight but dismissed the claims for detention and special expenses. The claimants appealed.]

LORD SUMNER. . . . With the fullest recognition of the rights of neutral ships, it is impossible to say that owners of such ships can claim damages from a belligerent for putting into force such an Order in Council as that of March 11, 1915, if the Order be valid. The neutral exercising his trading rights on the high seas and the belligerent exercising on the high seas rights given him by Order in Council or equivalent procedure, are each in the enjoyment and exercise of equal rights; and, without an express provision in the Order to that effect, the belligerent does not exercise his rights subject to any over-riding rights in the neutral. The claimants' real contention is, and is only, that the Order in Council is contrary to international law, and is invalid.

Upon this subject two passages in *The Zamora*, [1916] 2 A. C. 77, 95, 98, are in point. The first is at p. 95, and relates to Sir William Scott's decision in *The Fox*, Edw. 311. "The decision proceeded upon the principle that, where there is just cause for retaliation, neutrals may by the law of nations be required to submit to inconvenience from the act of a belligerent power

greater in degree than would be justified had no just cause for retaliation arisen, a principle which had been already laid down in *The Lucy*, (1809) Edw. 122."

Further, at p. 98, are the words "An order authorising reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case." . . .

What is here in question is not the right of the belligerent to retaliate upon his enemy the same measure as has been meted out to him, or the propriety of justifying in one belligerent some departure from the regular rules of war on the ground of necessity arising from prior departures on the part of the other, but it is the claim of neutrals to be saved harmless under such circumstances from inconvenience or damage thereout arising. If the statement above quoted from *The Zamora* be correct, the recitals in the Order in Council sufficiently establish the existence of such breaches of law on the part of the German Government as justify retaliatory measures on the part of His Majesty, and, if so, the only question open to the neutral claimant for the purpose of invalidating the Order is whether or not it subjects neutrals to more inconvenience or prejudice than is reasonably necessary under the circumstances.

Their Lordships think that such a rule is sound, and indeed inevitable. From the nature of the case the party who knows best whether or not there has been misconduct calling such a principle into operation, is a party who is not before the Court, namely, the enemy himself. The neutral claimant can hardly have much information about it, and certainly cannot be expected to prove or disprove it. His Majesty's Government, also well aware of the facts, has already, by the fact as well as by the recitals of the Order in Council, solemnly declared the substance and effect of that knowledge, and an independent inquiry into the course of contemporary events, both naval and military, is one which a Court of Prize is but ill-qualified to undertake for itself. Still less would it be proper for such a Court to inquire into the reasons of policy, military or other, which have been the cause and are to be the justification for resorting to retalia-

tion for that misconduct. Its function is, in protection of the rights of neutrals, to weigh on a proper occasion the measures of retaliation which have been adopted in fact, and to inquire whether they are in their nature or extent other than commensurate with the prior wrong done, and whether they inflict on neutrals, when they are looked at as a whole, inconvenience greater than is reasonable under all the circumstances. It follows that a Court of Prize, while bound to ascertain, from the terms of the Order itself, the origin and the occasion of the retaliatory measures for the purpose of weighing those measures with justice as they affect neutrals, nevertheless ought not to question, still less to dispute, that the warrant for passing the Order, which is set out in its recitals, has in truth arisen in the manner therein stated. Although the scope of this inquiry is thus limited in law, in fact their Lordships cannot be blind to what is notorious to all the world and is in the recollection of all men, the outrage namely committed by the enemy, upon law, humanity, and the rights, alike of belligerents and neutrals, which led to, and indeed compelled, the adoption of some such policy as is embodied in this Order in Council. In considering whether more inconvenience is inflicted upon neutrals than the circumstances involve, the frequency and the enormity of the original wrongs are alike material, for the more gross and universal those wrongs are, the more are all nations concerned in their repression, and bound for their part to submit to such sacrifices as that repression involves. It is right to recall that, as neutral commerce suffered and was doomed to suffer gross prejudice from the illegal policy proclaimed and acted on by the German Government, so it profited by, and obtained relief from, retaliatory measures, if effective to restrain, to punish and to bring to an end such injurious conduct. Neutrals, whose principles or policy lead them to refrain from punitive or repressive action of their own, may well be called on to bear a passive part in the necessary suppression of courses which are fatal to the freedom of all who use the seas.

The argument principally urged at the bar ignored these considerations, and assumed an absolute right in neutral trade to proceed without interference or restriction, unless by the application of the rules heretofore established as to contraband traffic, unneutral service and blockade. The assumption was that a neutral, too pacific or too impotent to resent the aggressions and lawlessness of one belligerent, can require the other to

refrain from his most effective, or his only, defence against it, by the assertion of an absolute inviolability for his own neutral trade, which would thereby become engaged in a passive complicity with the original offender. For this contention no authority at all was forthcoming. Reference was made to the Orders in Council of 1806 to 1812, which were framed by way of retaliation for the Berlin and Milan decrees. There has been much discussion of these celebrated instruments on one side or the other, though singularly little in decided cases or in treatises of repute; and, according to their nationality or their partisanship, writers have denounced the one policy or the other, or have asserted their own superiority by an impartial censure of both. The present Order, however, does not involve for its justification a defence of the very terms of those Orders in Council. It must be judged on its merits and, if the principle is advanced against it that such retaliation is wrong in kind, no foundation in authority has been found on which to rest it. Nor is the principle itself sound. The seas are the highway of all, and it is incidental to the very nature of maritime war that neutrals, in using that highway, may suffer inconvenience from the exercise of their concurrent rights by those who have to wage war upon it. Of this fundamental fact the right of blockade is only an example. It is true that contraband, blockade, and unneutral service are branches of international law which have their own history, their own illustrations, and their own development. Their growth has been unsystematic, and the assertion of right under these different heads has not been closely connected or simultaneous. Nevertheless, it would be illogical to regard them as being in themselves disconnected topics or as being the subject of rights and liabilities which have no common connexion. They may also be treated, as in fact they are, as illustrations of the broad rule that belligerency and neutrality are states so related to one another that the latter must accept some abatement of the full benefits of peace in order that the former may not be thwarted in war in the assertion and defence of what is the most precious of all the rights of nations, the right to security and independence. The categories of such cases are not closed. To deny to the belligerent under the head of retaliation any right to interfere with the trade of neutrals beyond that which, quite apart from circumstances which warrant retaliation, he enjoys already under the heads of contraband, blockade, and unneutral service, would be to take away with one hand what

has formally been conceded with the other. As between belligerents acts of retaliation are either the return of blow for blow in the course of combat, or are questions of the laws of war not immediately falling under the cognizance of a Court of Prize. Little of this subject is left to Prize Law beyond its effect on neutrals and on the rights of belligerents against neutrals, and to say that retaliation is invalid as against neutrals, except within the old limits of blockade, contraband, and unneutral service, is to reduce retaliation to a mere simulacrum, the title of an admitted right without practical application or effect.

Apart from *The Zamora*, the decided cases on this subject, if not many, are at least not ambiguous. Of *The Leonora*, [1918] P. 182, decided on the later Order in Council, their Lordships say nothing now, since they are informed that it is under appeal to their Lordships' Board, and they desire on the present occasion to say no more, which might affect the determination of that case, than is indispensable to the disposal of the present one.

Sir William Scott's decisions on the retaliatory Orders in Council were many, and many of them were affirmed on appeal. He repeatedly, and in reasoned terms, declared the nature of the right of retaliation and its entire consistency with the principles of international law. Since then discussion has turned on the measures by which effect was then given to that right, not on the foundation of the principle itself, and their Lordships regard it as being now too firmly established to be open to doubt.

Turning to the question which was little argued, if at all, though it is the real question in the case, whether the Order in Council of March 11, 1915, inflicts hardship excessive either in kind or in degree upon neutral commerce, their Lordships think that no such hardship was shown. It might well be said that neutral commerce under this Order is treated with all practicable tenderness, but it is enough to negative the contention that there is avoidable hardship. Of the later Order in Council they say nothing now. If the neutral shipowner is paid a proper price for the service rendered by his ship, and the neutral cargo-owner a proper price according to the value of his goods, substantial cause of complaint can only arise if considerations are put forward which go beyond the ordinary motives of commerce and partake of a political character, from a desire either to embarrass the one belligerent or to support the other. In the present case the agreement of the parties as to the amount to be

allowed for freight disposes of all question as to the claimants' rights to compensation for mere inconvenience caused by enforcing the Order in Council. Presumably that sum took into account the actual course and duration of the voyage and constituted a proper recompense alike for carrying and for discharging the cargo under the actual circumstances of that service. The further claims are in the nature of claims for damages for unlawful interference with the performance of the Rotterdam charterparty. They can be maintained only by supposing that a wrong was done to the claimants, because they were prevented from performing it, for in their nature these claims assume that the shipowners are to be put in the same position as if they had completed the voyage under that contract, and are not merely to be remunerated on proper terms for the performance of the voyage, which was in fact accomplished. In other words, they are a claim for damages, as for wrong done by the mere fact of putting in force the Order in Council. Such a claim cannot be sustained. Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

THE LEONORA.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1919.
Law Reports [1919] A. C. 974.

Appeal from decrees of the Admiralty Division (in Prize)
dated April 18, 1918, [1918] P. 182.

The appellants in the two appeals were respectively the owners of the Dutch steamship *Leonora* and the owners of a cargo of coal which she was carrying when captured. The ship and cargo were seized and condemned under an Order in Council of February 16, 1917, known as the second retaliatory Order. . . .

LORD SUMNER. The *Leonora*, a Dutch steamship bound from Rotterdam to Stockholm direct, was stopped on August 16, 1917, by His Majesty's torpedo-boat F77, outside territorial waters, and shortly after passing Ymuiden. She was taken into Harwich. Her cargo, which was neutral-owned, consisted of coal,

the produce of collieries in Belgium. It was not intended that she should call at any British or Allied port, nor had any application been made on her behalf for the appointment of a British port for the examination of her cargo. Both ship and cargo were condemned, pursuant to the Order in Council, dated February 16, 1917, and both the shipowners and the cargo owners appeal. . . .

The appellant's main case was that the Order in Council was invalid, principally on the ground that it pressed so hardly on neutral merchants and interfered so much with their rights that, as against them, it could not be held to fall within such right of reprisal as a belligerent enjoys under the law of nations. . . .

In *The Stigstad*, [1919] A. C. 279, their Lordships had occasion to consider and to decide some at least of the principles upon which the exercise of the right of retaliation rests, and by those principles they are bound. In the present case, nevertheless, they have had the advantage of counsel's full re-examination of the whole subject and full citation of the authorities, and of a judgment by the President in the Prize Court, which is itself a monument of research. The case furthermore has been presented under circumstances as favourable to neutrals as possible, for the difference in the stringency of the two Orders in Council, that of 1915 and that of 1917, is marked, since in the case of the later Order the consequences of disregarding it have been increased in gravity and the burden imposed on neutrals has become more weighty. If policy or sympathy can be invoked in any case they could be and were invoked here.

Their Lordships, however, after a careful review of their opinion in *The Stigstad*, think that they have neither ground to modify, still less to doubt that opinion, even if it were open to them to do so, nor is there any occasion in the present case to embark on a general re-statement of the doctrine or a minute re-examination of the authorities.

There are certain rights, which a belligerent enjoys by the law of nations in virtue of belligerency, which may be enforced even against neutral subjects and to the prejudice of their perfect freedom of action, and this because without those rights maritime war would be frustrated and the appeal to the arbitrament of arms be made of none effect. Such for example are the rights of visit and search, the right of blockade and the right of preventing traffic in contraband of war. In some cases a part of

the mode in which the right is exercised consists of some solemn act of proclamation on the part of the belligerent, by which notice is given to all the world of the enforcement of these rights and of the limits set to their exercise. Such is the proclamation of a blockade and the notification of a list of contraband. In these cases the belligerent Sovereign does not create a new offence *motu proprio*; he does not, so to speak, legislate or create a new rule of law; he elects to exercise his legal rights and puts them into execution in accordance with prescriptions of the existing law. Nor again in such cases does the retaliating belligerent invest a Court of Prize with a new jurisdiction or make the Court his mandatory to punish a new offence. The office of a Court of Prize is to provide a formal and regular sanction of the law of nations applicable to maritime warfare, both between belligerent and belligerent and between belligerent and neutral. Whether the law in question is brought into operation by the act of both belligerents in resorting to war, as is the case with the rules of international law as to hostilities in general, or by the assertion of a particular right arising out of a particular provocation in the course of the war on the part of one of them, it is equally the duty of a Court of Prize, by virtue of its general jurisdiction as such, to provide for the regular enforcement of that right, when lawfully asserted before it, and not to leave that enforcement to the mere jurisdiction of the sword. Disregard of a valid measure of retaliation is as against neutrals just as justiciable in a Court of Prize as is breach of blockade or the carriage of contraband of war. The jurisdiction of a Court of Prize is at least as essential in the neutral's interest as in the interest of the belligerent, and if the Court is to have power to release in the interest of the one, it must also have inherent power to condemn in justice to the other. Capture and condemnation are the prescriptive and established modes by which the law of nations as applicable to maritime warfare is enforced. Statutes and international conventions may invest the Court with other powers or prescribe other modes of enforcing the law, and the belligerent Sovereign may in the appropriate form waive part of his rights and disclaim condemnation in favour of some milder sanction, such as detention. In the terms of the present Order, which says that a vessel (par. 2) shall be "liable to capture and condemnation" and that goods (par. 3) shall be "liable to condemnation," some argument has been found for the appellant's main proposition,

that the Order in Council creates an offence and attaches this penalty, but their Lordships do not accept this view. The Order declares, by way of warning and for the sake of completeness, the consequences which may follow from disregard of it; but, if the occasion has given rise to the right to retaliate, if the belligerent has validly availed himself of the occasion, and if the vessel has been encountered at sea under the circumstances mentioned, the right and duty to bring the ship and cargo before a Court of Prize, as for a justiciable offence against the right of the belligerent, has arisen thereupon, and the jurisdiction to condemn is that which is inherent in the Court. That a rebuttable presumption is to be deemed to arise under par. 1, and that a saving proviso is added to par. 2, are modifications introduced by way of waiver of the Sovereign's rights. Had they been omitted the true question would still have been the same, though arising in a more acute form, namely, does this exercise of the right of retaliation upon the enemy occasion inconvenience or injustice to a neutral, so extreme as to invalidate it as against him? In principle it is not the belligerent who creates an offence and imposes a penalty by his own will and then by his own authority empowers and directs the Court of Prize to enforce it. It is the law of nations, in its application to maritime warfare, which at the same time recognizes the right, of which the belligerent can avail himself *sub modo*, and makes violation of that right, when so availed of, an offence, and is the foundation and authority for the right and duty of the Court of Prize to condemn, if it finds the capture justified, unless that right has been reduced by statute or otherwise, or that duty has been limited by the waiver of his rights on the part of the Sovereign of the captors.

It is equally inadmissible to describe such an Order in Council as this as an executive measure of police on the part of the Crown for the purpose of preventing an inconvenient trade, or as an authority to a Court of Prize to punish neutrals for the enjoyment of their liberties and the exercise of their rights. Both descriptions, as is the way with descriptions *arguendo*, beg the question. Undoubtedly the right of retaliation exists. It is described in *The Zamora*, [1916] 2 A. C. 77; it is decided in *The Stigstad*, [1919] A. C. 279, as it had so often been decided by Sir William Scott over a century ago. It would be disastrous for the neutral, if this right were a mere executive right not subject to review in a Prize Court; it would be a denial of the

belligerents' right, if it could be exercised only subject to a paramount and absolute right of neutrals to be free to carry on their trade without interference or inconvenience. This latter contention has already been negatived in *The Stigstad*. The argument in favour of the former, drawn from the decisions of Sir William Scott, seems to their Lordships to be no less unacceptable. With the terms of the Proclamations and Orders in Council from 1806 to 1812 their Lordships are not now concerned. They were such that the decisions on them in many cases involved not merely the use of the term "blockade" but discussion of, or at least allusion to, the nature of that right. It is, however, in their opinion a mistake to argue, as has been argued before them, that in those decisions the right to condemn was deemed to arise from the fact that the cases were cases of blockade, although the occasion for the blockade was the passing of a retaliatory Order. In their opinion Sir William Scott's doctrine consistently was that retaliation is a branch of the rights which the law of nations recognizes as belonging to belligerents, and that it is as much enforceable by Courts of Prize as is the right of blockade. They find no warrant or authority for holding that it is only enforceable by them, when it chances to be exercised under the form or the conditions of a valid blockade. When once it is established that the conduct of the enemy gave occasion for the exercise of the right of retaliation, the real question is whether the mode in which it has been exercised is such as to be invalid by reason of the burden which it imposes on neutrals, a question pre-eminently one of fact and of degree.

The onslaught upon shipping generally which the German Government announced and carried out at the beginning of 1917 is now matter of history. Proof of its formidable character, if proof were needed, is to be found in a comparison between the Retaliation Orders in Council of 1915 and 1917, and their Lordships take the recitals of the latter Order as sufficiently establishing the necessity for further invoking the right of retaliation. They address themselves accordingly to what is the real question in the present appeal, namely, the character and the degree of the danger and inconvenience to which the trade of neutrals was in fact subjected by the enforcement of that Order. They do not think it necessary to criticize theoretic applications of the language of the Order to distant seas where the enemy had neither trade nor shipping, a criterion which was

argued for, but which they deem inapplicable. Nor have they been unmindful of the fact that, to some extent, a retaliatory Order visits on neutrals the consequences of others' wrongdoing, always disputed though in the present case hardly disputable, and that the other belligerent, in his turn and also under the name of Retaliation, may impose upon them fresh restrictions, but it seems to them that these disadvantages are inherent in the nature of this established right, are unavoidable under a system which is a historic growth and not a theoretic model of perfection, and are relevant in truth only to the question of degree. Accordingly they have taken the facts as they affected the trade in which the *Leonora* was engaged, and they have sincerely endeavoured, as far as in them lay, to view these facts as they would have appeared to fair-minded and reasonable neutrals and to dismiss the righteous indignation which might well become those who recall only the crisis of a desperate and terrible struggle.

Compliance with the requirements of the Order in Council would have involved the *Leonora* in difficulties, partly of a commercial and partly of a military character. Her voyage, and with it the ordinary expenses of her voyage, would have been enlarged, and the loss of time and possibly the length of the voyage might have been added to by the fact that no port or class of ports of call had been appointed for the purpose of the Order. Inconvenience of this character seems to be inevitable under the circumstances. In so far as it is measurable entirely in terms of money, the extra expense in such as could be passed on to the parties liable to pay freight, and neither by itself nor in connection with other and more serious matters should this kind of inconvenience be rated high.

It is important to observe that the Order does not forbid the carriage of the goods in question altogether. The neutral vessel may carry them at her peril, and that peril, so far as condemnation is concerned, may be averted if she calls at an appointed port. The shipowner, no doubt, would say that if his ship is to make the call he will never be able to ship the cargo, for its chance of escape would be but small, and that if he is to get the cargo he must risk his ship and undertake to proceed direct to her destination. The contention is less formidable than it appears to be on the surface. Their Lordships know well, and the late President with his experience knew incomparably better, with what ingenuity and artifice the origin of a cargo and every

other damaging circumstance about it have been disguised and concealed where the prize of success was high and the parties concerned were unfettered by scruples and inspired by no disinterested motives. They think that the chance of escape in a British port of call must be measured against the enormous economic advantage to the enemy of carrying on this export trade for the support of his foreign exchange and the benefit of his much-needed imports, and they are convinced that the chance might well be sufficient to induce the promoters of the trade both to pay, and indeed to prepay, whatever freight the shipowner might require in order to cover extra insurance and the costs of a protracted voyage, and to give to the actual shipper such favourable terms of purchase, insurance or otherwise, as would lead him to expose his cargo to the risk of detection of its origin. They are far from thinking that compliance with the Order would exclude neutrals from all the advantage of the trade. If the voyages were fewer in number they would tend to be more profitably singly, and in any case this particular traffic is but a very small part of the employment open, and legitimately so, to neutral traders, and the risk of its loss need not be regarded as of great moment.

There is also some evidence, though it is not very clear, that Dutch municipal law forbade, under heavy penalties, that such a deviation as would be required by a call at a British port should be made by a Dutch ship which had cleared for Sweden. If, however, the Order in Council is in other respects valid, their Lordships fail to see how the rights of His Majesty under it can be diminished or the authority of an international Court can be curtailed by local rules, which forbid particular nationals to comply with the Order. If the neutral is inconvenienced by such a conflict of duty, the cause lies in the prescriptions of his own country's law, and does not involve any invalidity in the Order.

Further, it is pointed out that, with the exception of France, the other Allied Powers did not find it necessary to resort to a similar act of retaliation, and it is contended that, upon a comparison with the Order of 1915 also, the consequences involved in a disregard of the Order of 1917 were of unnecessary severity and were unjustifiable. The first point appears to be covered by the rule that on a question of policy—and the question whether the time and occasion have arisen for resort to a further exercise of the right of retaliation is essentially a question of

policy—a Court of Prize ought to accept as sufficient proof the public declarations of the responsible Executive, but in any case the special maritime position of His Majesty in relation to that of his Allies affords abundant ground for refusing to regard a different course pursued by those Allies as a reason for invalidating the Order of 1917. If the second point involves, as it seems to imply, the contention that a belligerent must retaliate on his enemy, so far as neutrals are concerned, only on the terms of compensating them for inconvenience, if any is sustained, and of making it worth their while to comply with an Order which they do not find to be advantageous to their particular interests, it is inconsistent with the whole theory on which the right of retaliation is exercised. The right of retaliation is a right of the belligerent, not a concession by the neutral. It is enjoyed by law and not on sufferance; and doubly so when, as in the present case, the outrageous conduct of the enemy might have been treated as acts of war by all mankind.

Accordingly the most material question in this case is the degree of risk to which the deviation required would subject a neutral vessel which sought to comply with the Order. It is said, and with truth, that the German plan was by mine and by submarine to deny the North Sea to trade; that the danger, prospective and actual, which that plan involved must be deemed to have been real and great, or else the justification of the Order itself would fail; and that the deviation, which the *Leonora* must have undertaken, would have involved crossing and re-crossing the area of peril.

Their Lordships recall and apply what was said in *The Stigstad*, that in estimating the burden of the retaliation account must be taken of the gravity of the original offence which provoked it, and that it is material to consider not only the burden which the neutral is called upon to bear, but the peril from which, at the price of that burden, it may be expected that belligerent retaliation will deliver him. It may be—let us pray that it may be so—that an Order of this severity may never be needed and therefore may never be justified again, for the right of retaliation is one to be sparingly exercised and to be strictly reviewed. Still the facts must be faced. Can there be a doubt that the original provocation here was as grave as any recorded in history; that it menaced and outraged neutrals as well as belligerents; and that neutrals had no escape from the peril, except by the successful and stringent employment of unusual

measures, or by an inglorious assent to the enslavement of their trade? Their Lordships have none.

On the evidence of attacks on vessels of all kinds and flags, hospital ships not excepted, which this record contains, it is plain that measures of retaliation and repression would be fully justified in the interest of the common good, even at the cost of very considerable risk and inconvenience to neutrals in particular cases. Such a conclusion having been established, their Lordships think that the burden of proof shifts, and that it was for the appellants to show, if they desired, that the risk and inconvenience were in fact excessive, for the matter being one of degree it is not reasonable to require that the Crown, having proved so much affirmatively, should further proceed to prove a negative and to show that the risk and inconvenience in any particular class of cases were not excessive. Much is made in the appellants' evidence of the fact that calling at a British port would have taken the *Leonora* across a German mine-field, but it is very noticeable that throughout the case the very numerous instances of losses by German action are cases of losses by the action of submarines and not by mines. The appellants filed a series of affidavits, stating in identical terms that in proceeding to a British port of call vessels would incur very great risk of attack by submarines, especially if unaccompanied by an armed escort. Of the possibility of obtaining an armed escort or other similar protection they say nothing, apparently because they never had any intention of complying with the Order in Council, and therefore were not concerned to ascertain how much danger, or how little, their compliance would really involve. Proof of the amount of danger involved in crossing the mine-field in itself is singularly lacking, but the fact is plain that after a voyage of no extraordinary character the *Leonora* did reach Harwich in safety.

Under these circumstances their Lordships see no sufficient reason why, on a question of fact, as this question is, they should differ from the considered conclusion of the President. He was satisfied that the Order in Council did not involve greater hazard or prejudice to the neutral trade in question than was commensurate with the gravity of the enemy outrages and the common need for their repression, and their Lordships are not minded to disturb his finding. The appeals accordingly fail. Their Lordships will humbly advise His Majesty that they should be dismissed with costs.

NOTE.—In the course of an exhaustive opinion characterized by Sir Frederick Pollock as "a landmark in the history of prize law," Sir Samuel Evans, President of the British Prize Court, in speaking of the relation of the right of retaliation to international law, in *The Leonora* (1918), L. R. [1918] P. 182, 226, 227, 228, said:

If retaliation is permissible for conduct of a belligerent clearly contrary to the law of nations and of humanity, the acts of retaliation (assuming them to be in the circumstances reasonable) may be described as outside and beyond the limits of the law of nations although justifiable; the alternative view is that the circumstances which call for such acts of retaliation extend that law so as to cover and comprehend them within its limits. The latter seems to me to be the preferable view. It is because the retaliation is regarded as forming part of the law of nations that it is cognizable in, and can be enforced by, a Court of Prize. . . .

Let me add that if such a retaliation was not permissible by the law of nations, it is conceivable that neutral States might, by the exercise of their alleged right to carry on trade with a belligerent without interference, become the actual arbiters of the fate of a disastrous war to which they were not parties, and from which they not only did not suffer loss, but actually achieved gain.

The Order in Council of February 16, 1917 recited the measures adopted by Germany for the establishment of a war zone about Great Britain, France and Italy which made it necessary that further steps should be taken for preventing "commodities of any kind from reaching or leaving the enemy countries," and proceeded:

His Majesty is therefore pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, that the following directions shall be observed in respect of all vessels which sail from their port of departure after the date of this Order:

1. A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or allied territory, shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the Prize Court.

2. Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods; provided that, in the case of any vessel which calls at an appointed British or allied port for the examination of her cargo, no sentence of condemnation shall be pronounced in respect only of the carriage of goods of enemy origin or destination, and no such presumption as is laid down in art. 1 shall arise.

- 3. Goods which are found on the examination of any vessel to be goods of enemy origin or of enemy destination shall be liable to condemnation.

It will be noted that this Order in Council, which was more stringent than the Order in Council of 1915, made no attempt to interfere with cargoes which were intended for consumption in neutral countries, provided the vessels carrying such cargoes submitted to examination at designated British or Allied ports.

While the Orders in Council adopted by Great Britain in answer to the Berlin and Milan Decrees may be properly described as retaliatory measures, those adopted in 1915 and 1917 are more easily defended on other grounds. They have been attacked chiefly because they interfered with neutral commerce between neutral ports. If however it be recognized that a belligerent may rightfully capture or destroy the commerce of its enemy when found on the high seas, the fact that such commerce is at one stage between neutral ports cannot be allowed to operate to the destruction of the belligerent right of capture. All the world knew that a large part of the cargoes consigned to Dutch and Danish ports was destined for Germany. In the face of that fact, the American Secretary of State, in his exchange of notes with the British Foreign Office as to the effect on American commerce of the Order in Council of 1915, argued that Great Britain's right to interfere with commerce with the enemy depended upon a strict compliance with the technical rules of blockade which had been developed in previous wars, and ignored the innovations in methods of warfare which necessitated new methods of exercising the belligerent rights of capture and blockade. While admitting the right to prevent any direct commercial intercourse with the enemy through enemy ports which had been blockaded, it was contended that if the commerce was carried on through the ports of contiguous neutral countries, it was not open to attack on the high seas. This was a sacrifice of substance to form, and in the words of Sir Samuel Evans was allowing "one's eyes to be filled by the dust of theories and technicalities, and to be blinded to the realities of the case."

The correspondence between the American Department of State and the British Foreign Office as to the Order in Council of 1915 is well treated in Hyde, II, 657.

In the course of the Great War several conditions developed which will materially modify the law of war. In the first place, much of the old law as to the relations between belligerent states is based upon the assumption that war is in essence a conflict between their fighting forces and not between their populations. Whether or not that condition ever in fact existed; it no longer obtains. Prior to the Great War, all the resources of Germany—military, industrial and financial—had been organized for war. Under such an organization a peasant woman cultivating a farm was as much a part of the military machine as was a soldier in the ranks, and from a military standpoint there was no reason for placing the two in different categories. In the course of the Great War, the adversaries of Germany were forced to adopt a similar type of organization, and in any future war of mag-

nitude, the resources of the belligerents will be mobilized on the same principle but with even greater care and effectiveness. This will necessarily result in a change in some of the rules of international law. One of the first which will be modified or even abolished is that which distinguishes between combatants and non-combatants. In future wars the only non-combatants will be those who are physically unable to contribute anything to the national resources. They will constitute so small a proportion of the population and the agencies of warfare will be of such a kind that their rights will receive scant respect. This is the inevitable result of organizing a whole nation for war.

In the second place, the old distinction between contraband and non-contraband will be little regarded and will probably disappear altogether. If entire nations are organized for war, the basis of the distinction no longer exists, and all cargoes for the use of the enemy population will be subject to capture.

In the third place, the invention of the submarine and of torpedoes which can be directed by radio makes impossible the maintenance of a blockade in accordance with the old rules. Hence if belligerents are to exercise their recognized rights against the commerce of the enemy, they must devise new means for the accomplishment of their object. If the end be legitimate, any means which are plainly adapted to it and which do not offend the current standards of humanity in the waging of war or violate international agreements must be recognized as legitimate. It is not to be expected that a belligerent will risk the loss of a war merely because new methods of warfare have made the old rules of blockade inapplicable.

CHAPTER XX.

THE DOCTRINE OF CONTINUOUS VOYAGE OR ENEMY DESTINATION.

THE WILLIAM.

LORDS COMMISSIONERS OF APPEAL IN PRIZE CAUSES OF ENGLAND. 1806.
5 C. Robinson, 385.

This was a question on the continuity of a voyage in the colonial trade of the enemy, brought by appeal from the Vice Admiralty Court at Halifax, where the ship and cargo, taken on a destination to Bilboa in Spain, and claimed on behalf of Messrs. W. and N. Hooper of Marblehead in the state of Massachusetts, had been condemned 17th July, 1800.

It appeared in evidence, that the ship had gone to Martinique, where the outward cargo was disposed of; that she then proceeded to La Guira, and took on board a cargo of cocoa, the property of the owners, which was brought to Marblehead on the 29th May, and unladen; that the ship was then cleaned and slightly repaired, and again took on board the chief part of the former cargo, . . . and sailed on or before the 7th June, upon a destination to Bilboa. Among the papers was a certificate from the collector of the customs, "that this vessel had entered and landed a cargo of cocoa belonging to Messrs. W. and N. Hooper, and that the duties had been secured agreeable to law, and that the said cargo had been re-shipped on board this vessel bound for Bilboa." . . .

SIR WILLIAM GRANT—The question in this case is, whether that part of the cargo which has been the subject of further proof, and which, it is admitted, was at the time of the capture, going to Spain, is to be considered as coming directly from Lagaira within the meaning of his Majesty's instructions. According to our understanding of the law, it is only from those instructions that neutrals derive any right of carrying on with

the colonies of our enemies, in time of war, a trade from which they were excluded in time of peace. The instructions had not permitted the direct trade between the hostile colony and its mother country, but had, on the contrary ordered all vessels engaged in it to be brought in for lawful adjudication; and what the present claimants accordingly maintain, is not that they could carry the produce of Laguira directly to Spain; but that they were not so carrying the cargo in question, inasmuch as the voyage in which it was taken was a voyage from North America, and not directly from a colony of Spain.

What then, with reference to this subject, is to be considered as a direct voyage from one place to another? Nobody has ever supposed that a mere deviation from the straightest and shortest course, in which the voyage could be performed, would change its denomination, and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree or the direction of deviation—whether it be of more or fewer leagues, whether towards the coast of Africa, or towards that of America. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; nor will it the more change, because a party may choose arbitrarily by the ship's papers or otherwise to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done: Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm, that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may

not always be discernible, but when it is discovered, it is according to the truth and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That those acts have been attended with trouble and expence cannot alter their quality or their effect. The trouble and expence may weigh as circumstances of evidence, to shew the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be found to accept as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same; but there is this difference between them.—The landing of the cargo, the entry at the custom-house, and the payment of such duties as the law of the place requires, are necessary ingredients in a genuine importation; the true purpose of the owner cannot be effected without them. But in a fictitious importation they are mere voluntary ceremonies, which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage which he has resolved to continue, the appearance of being broken by an importation, which he has resolved not really to make.

Now, what is the case immediately before us? The cargo in question was taken on board at Lagaira. It was at the time of the capture proceeding to Spain; but the ship had touched at an American port. The cargo was landed and entered at the custom-house, and a bond was given for the duties to the amount of 1,239 dollars. The cargo was re-shipped, and a debenture for 1,211 dollars by way of drawback was obtained. All this passed in the course of a few days. The vessel arrived at Marblehead on the 29th of May; on that day the bond for securing the duties was given. On the 30th and 31st the goods were landed, weighed, and packed. The permit to ship them is dated the 1st of June, and on the 3d of June the vessel is cleared out as laden, and ready to proceed to sea. We are

frequently obliged to collect the purpose from the circumstances of the transaction. The landing thus almost instantaneously followed by the re-shipment, has little appearance of having been made with a view to actual importation; but it is not upon inference that the conclusion in this case is left to rest. The claimants instead of shewing that they really did import their cargo, have, in their attestation, stated the reasons which determined them not to import it. They say indeed, that when they ordered it to be purchased, "it was with the single view of bringing it to the United States, and that they had no intention or expectation of exporting it in the said schooner to Spain." Supposing that from this somewhat ambiguous statement we are to collect that their original intention was to have imported this cargo into America, with a view only to the American market, yet their intention had been changed before the arrival of the vessel. For they state that in the beginning of May they had received accounts of the prices of cocoa in Spain, which satisfied them that it would sell much better there than in America, and that they had therefore determined to send it to the Spanish market. Nothing is alledged to have happened between the landing of the cargo and its reshipment, that could have the least influence on their determination. It was not in that short interval that American prices fell, or that information of the higher prices in Spain had been received. Knowing beforehand the comparative state of the two markets, they neither tried nor meant to try that of America, but proceeded with all possible expedition to go through the forms which have been before enumerated. If the continuity of the voyage remains unbroken, it is immaterial whether it be by the prosecution of an original purpose to continue it, as in the case of the *Essex*, or, as in this case, by the relinquishment of an original purpose to have brought it to a termination in America. It can never be contended, that an intention to import once entertained is equivalent to importation. And it would be a contradiction in terms to say that by acts done after their original intention has been abandoned, such original intention has been carried into execution. Why should a cargo, which there was to be no attempt to sell in America, have been entered at an American custom-house, and voluntarily subjected to the payment of any, even the most trifling duty? Not because an importation was, or in such a case could be intended, but because it was thought expedient that something should be done, which in a British

Prize Court might pass for importation. Indeed the claimants seem to have conceived that the enquiry to be made here was, not, whether the importation was real or pretended, but whether the pretence had assumed a particular form, and was accompanied with certain circumstances which by some positive rule were, in all cases, to stand for importation, or to be conclusive evidence of it. . . .

But supposing that we had uniformly held that payment of the import duties furnished conclusive evidence of importation, would there have been any inconsistency or contradiction in holding that the mere act of giving a bond for an amount of duties, of which only a very insignificant part was ever to be paid, could not have the same effect as the actual payment of such amount? The further proof in the *Essex* first brought distinctly before us the real state of the fact in this particular. It has been already mentioned that we had called for an account of the drawbacks, if any, that had been received. This produced the information that although the duties secured amounted to 5,278 dollars, yet a debenture was immediately afterwards given for no less than 5,080 dollars; so that on that valuable cargo no more than 198 dollars would be ultimately payable, which sum is said to be more than compensated by the advantage arising from the negotiability of the debenture. . . .

The consequence is that the voyage was illegal, and that the sentence of condemnation must be affirmed.

THE SPRINGBOK.

SUPREME COURT OF THE UNITED STATES. 1866.
5 Wallace, 1.

Appeal from a decree of the District Court of the United States for the Southern District of New York.

[The British boat *Springbok*, commanded by the son of one of its owners, was chartered in November, 1862, to T. S. Begbie of London to take a cargo of merchandise and therewith "proceed to Nassau, or as near thereunto as she may safely get, and deliver same." The brokers charged with the lading, acting for Isaac, Campbell & Co., instructed the master in December,

1862, "You will proceed at once to the port of Nassau, N. P., and on arrival report yourself to Mr. B. W. Hart there, who will give you orders as to the delivery of your cargo." By the bills of lading the cargo was made deliverable to order or assigns. The Springbok was captured February 3, 1863 by an American war vessel about 150 miles from Nassau, which it was a matter of common knowledge was then used as a port for the transshipment of cargoes destined for blockaded ports in the Southern States. At the hearing in the District Court evidence introduced in the cases of the Stephen Hart captured January 28, 1863 and the Gertrude captured April 16, 1863, was invoked whereby it appeared that the cargoes in the three vessels consisted in whole or in part of contraband and were owned largely by the same persons. In the case of the Springbok, the District Court condemned both the ship and the cargo.]

The CHIEF JUSTICE [CHASE] delivered the opinion of the court. . . .

We have already held in the case of the Bermuda [(1865), 3 Wallace, 514], where goods, destined ultimately for a belligerent port, are being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods, that the ship, though liable to seizure in order to the confiscation of the goods, is not liable to condemnation as prize. We think that the Springbok fairly comes within this rule. . . .

The case of the cargo is quite different from that of the ship.

The bills of lading disclosed the contents of six hundred and nineteen, but concealed the contents of thirteen hundred and eighty-eight, of the two thousand and seven packages which made up the cargo. Like those in the Bermuda case they named no consignee, but required the cargo to be delivered to order or assigns. The manifest of the cargo also, like that in the Bermuda case, mentioned no consignee, but described the cargo as delivered to order. Unlike those bills and that manifest, however, these concealed the names of the real owners as well as the contents of more than two-thirds of the packages.

Why were the contents of the packages concealed? The owners knew that they were going to a port in the trade with which the utmost candor of statement might be reasonably required.

The adventure was undertaken several months after the publication of the answer of Earl Russell to the Liverpool shipowners. . . . In that answer the British foreign secretary had spoken of allegations by the American government that ships had been sent from England to America with fixed purpose to run the blockade, and that arms and ammunition had thus been conveyed to the Southern States to aid them in the war; and he had confessed his inability either to deny the allegations or to prosecute the offenders to conviction; and he had then distinctly informed the Liverpool memorialists that he could not be surprised that the cruisers of the United States should watch with vigilance a port which was said to be the great entrepôt of this commerce. For the concealment of the character of a cargo shipped for that entrepôt, after such a warning, no honest reason can be assigned. The true reason must be found in the design of the owners to hide from the scrutiny of the American cruisers the contraband character of a considerable portion of the contents of those packages.

And why were the names of those owners concealed? Can any honest reason be given for that? None has been suggested. But the real motive of concealment appears at once when we learn, from the claim, that Isaac, Campbell & Co., and Begbie were the owners of the cargo of the Springbok, and from the papers involved, that Begbie was the owner of the steamship Gertrude, laden in Nassau in April, 1863, with a cargo corresponding in several respects with that now claimed by him and his associates, and dispatched on a pretended voyage to St. John's, New Brunswick, but captured for unneutral conduct and abandoned to condemnation without even the interposition of a claim in the prize court; and when we learn further from the same papers that Isaac, Campbell & Co., were the sole owners of the cargo of the Stephen Hart, consisting almost wholly of arms and munitions of war, and sent on a pretended destination to Cardenas, but with a real one for the States in rebellion. Clearly the true motive of the concealment must have been the apprehension of the claimants, that the disclosure of their names as owners would lead to the seizure of the ship in order to the condemnation of the cargo.

We are next to ascertain the real destination of the cargo, for their concealments do not, of themselves, warrant condemnation. If the real intention of the owners was that the cargo should be landed at Nassau and incorporated by real sale into the common

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stock of the island, it must be restored, notwithstanding this misconduct.

What then was this real intention? That some other destination than Nassau was intended may be inferred, from the fact that the consignment, shown by the bills of lading and the manifest, was to order or assigns. Under the circumstances of this trade, already mentioned, such a consignment must be taken as a negation that any sale had been made to any one in Nassau. It must also be taken as a negation that any such sale was intended to be made there; for had such sale been intended, it is most likely that the goods would have been consigned for that purpose to some established house named in the bills of lading.

This inference is strengthened by the letter of Speyer & Haywood to the master, when about to sail from London. That letter directs him to report to B. W. Hart, the agent of the charterers at Nassau, and receive his instructions as to the delivery of the cargo. The property in it was to remain unchanged upon delivery. The agent was to receive it and execute the instructions of his principals.

What these instructions were may be collected, in part, from the character of the cargo.

A part of it, small in comparison with the whole, consisted of arms and munitions of war, contraband within the narrowest definition. Another and somewhat larger portion consisted of articles useful and necessary in war, and therefore contraband within the construction of the American and English prize courts. These portions being contraband, the residue of the cargo, belonging to the same owners, must share their fate. The *Immanuel*, 2 Robinson, 196; *Carrington v. Merchants' Insurance Co.*, 8 Peters, 495.

But we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we repeat, contraband or not, it could not be condemned, if really destined for Nassau and not beyond; and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade.

Looking at the cargo with this view, we find that a part of it was specially fitted for use in the rebel military service, and a larger part, though not so specially fitted, was yet well adapted to such use. Under the first head we include the sixteen dozen swords, and the ten dozen rifle-bayonets, and the forty-five thou-

sand navy buttons [marked "C. S. N."], and the one hundred and fifty thousand army buttons [marked "A", or "I", or "C,"]; and, under the latter, the seven bales of army cloth and the twenty bales of army blankets and other similar goods. We cannot look at such a cargo as this, and doubt that a considerable portion of it was going to the rebel States, where alone it could be used; nor can we doubt that the whole cargo had one destination.

Now if this cargo was not to be carried to its ultimate destination by the Springbok (and the proof does not warrant us in saying that it was), the plan must have been to send it forward by transshipment. And we think it evident that such was the purpose. We have already referred to the bills of lading, the manifest, and the letter of Speyer & Haywood, as indicating this intention; and the same inference must be drawn from the disclosures by the invocation, that Isaac, Campbell & Co. had before supplied military goods to the rebel authorities by indirect shipment, and that Begbie was owner of the Gertrude and engaged in the business of running the blockade.

If these circumstances were insufficient grounds for a satisfactory conclusion, another might be found in the presence of the Gertrude in the harbor of Nassau with undenied intent to run the blockade, about the time when the arrival of the Springbok was expected there. It seems to us extremely probable that she had been sent to Nassau to await the arrival of the Springbok and to convey her cargo to a belligerent and blockaded port, and that she did not so convey it, only because the voyage was intercepted by the capture.

All these condemnatory circumstances must be taken in connection with the fraudulent concealment attempted in the bills of lading and the manifest, and with the very remarkable fact that not only has no application been made by the claimants for leave to take further proof in order to furnish some explanation of these circumstances, but that no claim, sworn to personally, by either of the claimants, has ever been filed.

Upon the whole case we cannot doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the Springbok: that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to

condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing.

The decree of the District Court must, therefore, be reversed as to the ship . . . and must be affirmed as to the cargo.

NOTE.—No other decision of an American prize court, or perhaps of any prize court, has ever been so harshly condemned or so strikingly vindicated as has the decision in *The Springbok*. The Institute of International Law in 1882 submitted the principles involved to a committee composed of such distinguished jurists as Arntz, Asser, Bulmerincq, Gessner, Hall, De Martens, Pierantoni, Renault, Rolin, and Sir Travers Twiss, and representing most of the great maritime Powers, which denounced the decision as one tending to annihilate neutral trade. Moore, *Digest*, VII, 731. But in 1896 the Institute adopted the principle in this form:

A destination for the enemy is presumed when the carriage of the goods is directed toward one of his ports or toward a neutral port which by evident proofs arising from incontestable facts is only a stage in a carriage to the enemy as the final object of the same commercial transaction.

Annuaire de l'Institut de Droit International, 1896, 231.

It should be noted that those who criticised the decision in *The Springbok* generally insisted that the cargo was condemned on the suspicion that it was to be transhipped to some blockaded port. It would require an unusually credulous mind to believe, in the light of all the evidence, that the cargo could have had any other destination. Furthermore whether the cargo was condemned on suspicion depended on the rules of evidence followed by the court, and not on any principle of international law. The owners of the cargo petitioned the British Government to demand compensation from the American Government for the confiscation of their property. After a careful study of all the papers in the case, the British Government replied that they would not be "justified, on the materials before them, in making any claim" for compensation. Moore, *Digest*, VII, 723. The owners were again defeated when they presented their case to the International Commission provided for by article xiii of the Treaty of Washington, but damages were allowed for the detention of the vessel. Moore, *Int. Arb.* IV, 3928.

THE KIM. THE ALFRED NOBEL.

THE BJORNSTERJNE BJORNSON. THE FRIDLAND.

ADMIRALTY DIVISION (IN PRIZE) OF THE HIGH COURT OF JUSTICE OF ENGLAND. 1915.

L. R. [1915] P. 215.

The PRESIDENT (SIR SAMUEL EVANS). The cargoes which have been seized, and which are claimed in these proceedings, were laden on four steamships belonging to neutral owners, and were under time charters to an American corporation, the Gans Steamship Line. . . . The four ships . . . [three Norwegian and one Swedish] all started within a period of three weeks in October and November, 1914, on voyages from New York to Copenhagen with very large cargoes of lard, hog and meat products, oil stocks, wheat and other foodstuffs; two of them had cargoes of rubber and one of hides. They were captured on the high seas, and their cargoes were seized on the ground that they were conditional contraband, alleged to be confiscable in the circumstances, with the exception of one cargo of rubber which was seized as absolute contraband.

The Court is now asked to deal only with the cargoes. All questions relating to the capture and confiscability of the ships are left over to be argued and dealt with hereafter. . . .

Before proceeding to state the result of the examination of the facts relative to the respective cargoes and claims, a general review may be made of the situation which led up to the dispatch of the four ships with their cargoes to a Danish port.

Notwithstanding the state of war, there was no difficulty in the way of neutral ships trading to German ports in the North Sea, other than the perils which Germany herself had created by the indiscriminate laying and scattering of mines of all description, unanchored and floating outside territorial waters in the open sea in the way of the routes of maritime trade, in defiance of international law and the rules of conduct of naval warfare, and in flagrant violation of the Hague Convention to which Germany was a party. Apart from these dangers, neutral vessels could have, in the exercise of their international right, voyaged with their goods to and from Hamburg, Bremen, Emden, and any other ports of the German Empire. There was no blockade involving risk of confiscation of vessels running or attempting to run it. Neutral vessels might have carried con-

ditional and absolute contraband into those ports, acting again within their rights under international law, subject only to the risk of capture by vigilant warships of this country and its allies. But the trade of neutrals—other than the Scandinavian countries and Holland—with German ports in the North Sea having been rendered so difficult as to become to all intents impossible, it is not surprising that a great part of it should be deflected to Scandinavian ports from which access to the German ports in the Baltic and to inland Germany by overland routes was available, and that this deflection resulted, the facts universally known strongly testify. The neutral trade concerned in the present cases is that of the United States of America; and the transactions which have to be scrutinized arose from a trading, either real and bona fide, or pretended and ostensible only, with Denmark, in the course of which these vessels' sea voyages were made between New York and Copenhagen.

Denmark is a country with a small population of less than three millions; and is, of course, as regards foodstuffs, an exporting, and not an importing country. Its situation, however, renders it convenient to transport goods from its territory to German ports and places like Hamburg, Altona, Lübeck, Stettin, and Berlin.

The total cargoes in the four captured ships bound for Copenhagen within about three weeks amounted to 73,237,796 lbs. in weight. . . . Portions of these cargoes have been released, and other portions remain unclaimed. The quantity of goods claimed in these proceedings is very large. Altogether the claims cover 32,312,479 lbs. (exclusive of the rubber and hides). The claimants did not supply any information as to the quantities of similar products which they had supplied or consigned to Denmark previous to the war. Some illustrative statistics were given by the Crown, with regard to lard of various qualities, which are not without significance, and which form a fair criterion of the imports of these and like substances into Denmark before the war; and they give a measure for comparison with the imports of lard consigned to Copenhagen after the outbreak of war upon the four vessels now before the Court.

The average annual quantity of lard imported into Denmark during the three years 1911-1913 from all sources was 1,459,000 lbs. The quantity of lard consigned to Copenhagen on these four ships alone was 19,252,000 lbs. Comparing these quanti-

ties, the result is that these vessels were carrying towards Copenhagen within less than a month more than thirteen times the quantity of lard which had been imported annually to Denmark for each of the three years before the war.

To illustrate further the change effected by the war, it was given in evidence that the imports of lard from the United States of America to Scandinavia (or, more accurately, to parts of Europe other than the United Kingdom, France, Belgium, Germany, the Netherlands, and Italy) during the months of October and November, 1914, amounted to 50,647,849 lbs. as compared with 854,856 lbs. for the same months in 1913—showing an increase for the two months of 49,792,993 lbs.; or in other words the imports during these two months in 1914 were nearly sixty times those for the corresponding months of 1913.

One more illustration may be given from statistics which were given in evidence for one of the claimants (Hammond & Co. and Swift & Co.): In the five months August-December, 1913, the exports of lard from the United States of America to Germany were 68,664,975 lbs. During the same five months in 1914 they had fallen to a mere nominal quantity, 23,800 lbs. On the other hand, during those periods, similar exports from the United States of America to Scandinavian countries (including Malta and Gibraltar, which would not materially affect the comparison) rose from 2,125,579 lbs. to 59,694,447 lbs. These facts give practical certainty to the inference that an overwhelming proportion (so overwhelming as to amount to almost the whole) of the consignments of lard in the four vessels we are dealing with was intended for, or would find its way into, Germany. These, however, are general considerations, important to bear in mind in their appropriate place; but not in any sense conclusive upon the serious questions of consecutive voyages, of hostile quality, and of hostile destination, which are involved before it can be determined whether the goods seized are confiscable as prize. . . . [Here follows an elaborate analysis of the facts involved in the cases of the several claimants, in the course of which the learned judge found that the great bulk of the cargoes under consideration had been shipped "to order" or to the shippers' agents.]

With regard to the general character of the cargoes, evidence was given by persons of experience that all the foodstuffs were suitable for the use of troops in the field; that some, e. g., the smoked meat or smoked bacon, were similar in kind, wrapping,

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and packing to what was supplied in large quantities to the British troops, and were not ordinarily supplied for civilian use; that others, e. g., canned or boiled beef in tins, were of the same brand and class as had been offered by Armour & Co. for the use of the British forces in the field; and that the packages sent by these ships could only have been made up for the use of troops in the field. As against this, there was evidence that goods of the same class had been ordinarily supplied to and for civilians.

As to the lard, proof was given that glycerine (which is in great demand for the manufacture of nitro-glycerine for high explosives) is readily obtainable from lard. Although this use is possible, there was no evidence before me that any lard had been so used in Germany; and I am of opinion that the lard comprised ought to be treated upon the footing of foodstuffs only. It is largely used in German army rations.

As to the fat backs (of which large quantities were shipped), there was also proof that they could be used for the production of glycerine. . . . In fact no evidence . . . was offered for the shippers of fat backs. Mr. Nuttall, a deponent for one of them . . . says the fat backs shipped by them were not in a condition which was suitable for eating; but he may have meant only that they required further treatment before they became edible.

There was no market for these fat backs in Denmark. The Procurator-General deposed as a result of inquiries that the Germans were very anxious to obtain fat backs merely for the glycerine they contain. In these circumstances it is not by any means clear that fat backs should be regarded merely as foodstuffs in these cases, and in the absence of evidence to the contrary, it is fair to treat them as materials which might either be required as food, or for the production of glycerine.

The convenience of Copenhagen for transporting goods to Germany need hardly be mentioned. It is in evidence that the chief trade between Copenhagen and Germany since the war was through Lübeck, Stettin, and Hamburg.

The sea-borne trade of Lübeck has increased very largely since this war. It was also sworn in evidence that Lübeck was a German naval base. Stettin is a garrison town, and is the headquarters of army corps. It has also shipbuilding yards where warships are constructed and repaired. It is Berlin's nearest seaport. It will be remembered that one of the big shipping

companies asked a Danish firm to become nominal consignees for goods destined for Stettin. Hamburg and Altona had ceased to be the commercial ports dealing with commerce coming through the North Sea. They were the headquarters of various regiments. Copenhagen is also a convenient port for communication with the German naval arsenal and fortress of Kiel and its canal, and for all places reached through the canal. These ports may properly be regarded, in my opinion, as bases of supply for the enemy, and the cargoes destined for these might on that short ground be condemned as prize; but I refer, especially as no particular cargo can definitely be said to be going to a particular port, to deal with the cases upon broader grounds.

Before stating the inferences and conclusions of fact, it will be convenient to investigate and ascertain the legal principles which are to be applied according to international law, in view of the state of things as they were in the year 1914.

While the guiding principles of the law must be followed, it is a truism to say that international law, in order to be adequate, as well as just, must have regard to the circumstances of the times, including "the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it:" *vide* The *Jonge Margaretha* (1799), 1 C. Rob. 189, and Chancellor Kent's Commentaries, p. 139.

Two important doctrines familiar to international law come prominently forward for consideration: the one is embodied in the rule as to "continuous voyage," or continuous "transportation"; the other relates to the ultimate hostile destination of conditional and absolute contraband respectively.

The doctrine of "continuous voyage," was first applied by the English Prize Courts to unlawful trading. There is no reported case in our Courts where the doctrine is applied in terms to the carriage of contraband; but it was so applied and extended by the United States Courts against this country in the time of the American Civil War; and its application was acceded to by the British Government of the day: and was, moreover, acted upon by the International Commission which sat under the Treaty between this country and America, made at Washington on May 8, 1871, when the commission, composed of an Italian, an American, and a British delegate, unanimously disallowed the claims in *The Peterhoff*, (1866), 5 Wallace, 28, which was the leading case upon the subject of continuous transportation in relation to contraband goods. . . .

I am not going through the history of it, but the doctrine was asserted by Lord Salisbury at the time of the South African war with reference to German vessels carrying goods to Delagoa Bay, and as he was dealing with Germany, he fortified himself by referring to the view of Bluntschli as the true view as follows: "If the ship or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, these will be contraband of war, and confiscation will be justified."

It is essential to appreciate that the foundation of the law of contraband, and the reason for the doctrine of continuous voyage which has been grafted into it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use. Neutral traders, in their own interest, set limits to the exercise of this right as far as they can. These conflicting interests of neutrals and belligerents are the causes of the contests which have taken place upon the subject of contraband and continuous voyages.

A compromise was attempted by the London Conference in the unratified Declaration of London. The doctrine of continuous voyage or continuous transportation was conceded to the full by the conference in the case of absolute contraband, and it was expressly declared that "it is immaterial whether the carriage of the goods is direct, or entails transshipment, or a subsequent transport by land."

As to conditional contraband, the attempted compromise was that the doctrine was excluded in the case of conditional contraband, except when the enemy country had no seaboard. As is usual in compromises, there seems to be an absence of logical reason for the exclusion. If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which though not absolutely contraband, become contraband by reason of a further destination to the enemy Government or its armed forces? And with the facilities of transportation by sea and by land which now exist the right of a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port were sufficient to protect the goods. It appears also to be obvious that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only

voyages from port to port at sea, but also transport by land, until the real, as distinguished from the merely ostensible, destination of the goods is reached.

In connection with this subject, note may be taken of the communication of January 20, 1915, from Mr. Bryan, as Secretary of State for the United States Government, to Mr. Stone, of the Foreign Relations Committee of the Senate. It is, indeed, a State document. In it the Secretary of State, dealing with absolute and conditional contraband, puts on record the following as the views of the United States Government:—

“The rights and interests of belligerents and neutrals are opposed in respect to contraband articles and trade. . . . The record of the United States in the past is not free from criticism. When neutral, this Government has stood for a restricted list of absolute and conditional contraband. As a belligerent, we have contended for a liberal list, according to our conception of the necessities of the case.

“The United States has made earnest representations to Great Britain in regard to the seizure and detention of all American ships or cargoes bona fide destined to neutral ports. . . . It will be recalled, however, that American Courts have established various rules bearing on these matters. The rule of ‘continuous voyage’ has been not only asserted by American tribunals, but extended by them. They have exercised the right to determine from the circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port ‘to order’ [this was of course before the Order in Council of October 29], from which, as a matter of fact, cargoes had been transhipped to the enemy, is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery. It is thus seen that some of the doctrines which appear to bear harshly upon neutrals at the present time are analogous to or outgrowths from policies adopted by the United States when it was a belligerent. The Government, therefore, cannot consistently protest against the application of rules which it has followed in the past, unless they have not been practiced as heretofore. . . . The fact that the commerce of the United States is interrupted by Great Britain is consequent upon the superiority of her navy on the high seas. History shows that whenever a country has possessed the superiority our trade has been interrupted, and that few articles essential to the prosecution of the war have been

allowed to reach its enemy from this country." . . .

I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage, or transportation, both in relation to carriage by sea and to carriage over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognized legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare.

The result is that the Court is not restricted in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen; but is entitled, and bound, to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible and, if so, what the real ultimate destination was.

As to the real destination of a cargo, one of the chief tests is whether it was consigned to the neutral port to be there delivered for the purpose of being imported into the common stock of the country. . . . [The learned judge here cites *The William* (1806), 5 C. Rob., 385, and *The Bermuda*, (1865), 3 Wallace, 514.] Another circumstance which has been regarded as important in determining the question of real or ostensible destination at the neutral port was the consignment "to order or assigns" without naming any consignee. In the celebrated case of *The Springbok* (1866), 5 Wallace, 1, the Supreme Court of the United States acted upon inferences as to destination (in the case of blockade) on this very ground. . . . The same circumstance was also similarly dealt with in *The Bermuda* (1865), 3 Wallace, 514, and in *The Peterhoff* (1866), 5 Wallace, 28.

I am not unmindful of the argument that consignment "to order" is common in these days. But a similar argument was used in *The Springbok*, supported by the testimony of some of the principal brokers in London, to the effect that a consignment "to order or assign" was the usual and regular form of consignment to an agent for sale at such a port as Nassau. . . . The argument still remains good, that if shippers, after the outbreak of war, consign goods of the nature of contraband to their own order without naming a consignee, it may be a circumstance of suspicion in considering the question whether the goods were really intended for the neutral destination, and to become part of the common stock of the neutral country, or whether they had another ultimate destination. Of course, it is not conclusive. The suspicion arising from this form of consignment during war

might be dispelled by evidence produced by the shippers. . . .

Upon this branch of the case—for reasons which have been given when dealing with the consignments generally, and when stating the circumstances with respect to each claim—I have no hesitation in stating my conclusion that the cargoes (other than the small portions acquired by persons in Scandinavia whose claims are allowed) were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that country by sale or otherwise; that Copenhagen was not the real bona fide place of delivery; but that the cargoes were on their way at the time of capture to German territory as their actual and real destination. . . .

Having decided that the cargoes, though ostensibly destined for Copenhagen, were in reality destined for Germany, the question remains whether their real ultimate destination was for the use of the German Government or its naval or military forces.

If the goods were destined for Germany, what are the facts and the law bearing upon the question whether they had the further hostile destination for the German Government for military use?

In the first place, as has already been pointed out, they were goods adapted for such use; and further, in part, adapted for immediate warlike purposes in the sense that some of them could be employed for the production of explosives. They were destined, too, for some of the nearest German ports like Hamburg, Lübeck, and Stettin, where some of the forces were quartered, and whose connection with the operations of war has been stated. It is by no means necessary that the Court should be able to fix the exact port: see *The Dolphin* (1863), 7 Fed. Cases, 868; *The Pearl* (1866), 5 Wallace, 574; *The Peterhoff* (1866), 5 Wallace, 28, 59.

Regard must also be had to the state of things in Germany during this war in relation to the military forces, and to the civil population, and to the method described in evidence which was adopted by the Government in order to procure supplies for the forces.

The general situation was described by the British Foreign Secretary in his Note to the American Government on February 10, 1915, as follows:—

“The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between

the civil population and the armed forces itself disappears. In any country in which there exists such a tremendous organization for war as now obtains in Germany, there is no clear division between those whom the Government is responsible for feeding and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the wants of the military are supplied, and however much goods may be imported for civil use it is by the military that they will be consumed if military exigencies require it, especially now that the German Government have taken control of all the foodstuffs in the country."—I am not saying that the last sentence is applicable to the circumstances of this case.—

"In the peculiar circumstances of the present struggle where the forces of the enemy comprise so large a proportion of the population, and where there is so little evidence of shipments on private as distinguished from Government account, it is most reasonable that the burden of proof should rest upon claimants."

It was given in evidence that about ten millions of men were either serving in the Germany army, or dependent upon or under the control of the military authorities of the German Government, out of a population of between 65 and 70 millions of men, women, and children. Of the food required for the population, it would not be extravagant to estimate that at least one-fourth would be consumed by these 10 million adults.

Apart altogether from the special adaptability of these cargoes for the armed forces, and the highly probable inference that they were destined for the forces, even assuming that they were indiscriminately distributed between the military and civilian population, a very large proportion would necessarily be used by the military forces. . . .

Now as to the question of the proof of intention on the part of the shippers of the cargoes.

It was argued that the Crown as captors out to show that there was an original intention by the shippers to supply the goods to the enemy Government or the armed forces at the inception of the voyage as one complete commercial transaction, evidenced by a contract of sale or something equivalent to it.

It is obvious from a consideration of the whole scheme of conduct of the shippers that if they had expressly arranged to consign the cargoes to the German Government for the armed

forces, this would have been done in such a way as to make it as difficult as possible for belligerents to detect it. If the captors had to prove such an arrangement affirmatively and absolutely, in order to justify capture and condemnation, the rights of belligerents to stop articles of conditional contraband from reaching the hostile destination would become nugatory. . . .

It is not necessary that an intention at the commencement of the voyage should be established by the captors either absolutely or by inference. . . . If at the time of the seizure the goods were in fact on their way to the enemy Government or its forces as their real ultimate destination, by the action of the shippers, whenever the project was conceived, or however it was to be carried out; if, in truth, it is reasonably certain that the shippers must have known that that was the real ultimate destination of the goods (apart of course from any genuine sale to be made at some intermediate place), the belligerent had a right to stop the goods on their way, and to seize them as confiscable goods. . . .

For the many reasons which I have given in the course of this judgment and which do not require recapitulation, or even summary, I have come to the clear conclusion from the facts proved, and the reasonable and, indeed, irresistible inferences from them, that the cargoes claimed by the shippers as belonging to them at the time of seizure were not on their way to Denmark to be incorporated into the common stock of that country by consumption, or bona fide sale, or otherwise; but, on the contrary, that they were on their way not only to German territory, but also to the German Government and their forces for naval and military use as their real ultimate destination.

To hold the contrary would be to allow one's eyes to be filled by the dust of theories and technicalities, and to be blinded to the realities of the case. . . .

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THE BARON STJERNBLAD.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1917.
Law Reports [1918] A. C. 173.

Appeal from a judgment of the President [Sir Samuel Evans] of the Admiralty Division (in Prize) delivered on November 27, 1916.

The Danish steamship *Baron Stjernblad* while on a voyage from Lisbon to Copenhagen was detained at North Shields, and on April 18, 1916, 3000 bags of cocoa, forming part of her cargo, were there seized. The goods were consigned from Lisbon under bills of lading making them deliverable at Gothenburg to the order of the appellants, a Swedish corporation carrying on business at Stockholm as manufacturers of cocoa and chocolate.

On May 26 the appellants applied to the Procurator-General for the release of the goods, and on July 10 sent to him an affidavit by their managing director. The affidavit stated that the goods had been bought and paid for by the appellants and were at all times intended exclusively for consumption in the appellants' factory at Stockholm. . . .

The action was heard by the President on November 27, 1916, when the appellants claimed the release of the goods and the costs, damages and expenses which they had incurred by reason of the seizure and detention. The Attorney-General at the conclusion of the case did not press for the condemnation of the goods, but contended that there were circumstances of suspicion which disentitled the appellants from recovering costs, damages or expenses.

The learned President ordered the goods to be released, but rejected the claim for costs, damages and expenses. He was of opinion that there was reasonable ground for the seizure, and that, having regard to various facts of the case, the Procurator-General was justified in proceeding to the final hearing. . . .

LORD PARKER OF WADDINGTON. On April 18, 1916, His Majesty's officer of Customs at the port of North Shields seized as prize 3000 bags of cocoa beans on board the Danish steamship *Baron Stjernblad*, the ground of seizure being that the goods were contraband of war.

It is not disputed that cocoa beans are contraband but by the

bills of lading the 3000 bags in question were deliverable to the appellants at Gothenburg, a neutral port, and the only question, therefore, was whether, beyond their ostensible destination at Gothenburg, they had a further or ultimate destination in an enemy country. The President decided on the evidence that they had not, and ordered their release to the appellants, but he refused to allow the appellants any damages or costs, and the present appeal is from this refusal.

The law on the subject is reasonably certain. It is clearly stated in the letter of Sir William Scott and Sir John Nicholl, printed pp. 1-11 of Pratt's edition of Mr. Justice Story's *Notes on the Principles and Practices of Prize Courts*, and in the case of *The Ostsee* (1855), 3 Moore, P. C. 150. If there were no circumstance of suspicion, or, as it is sometimes put, "no probable cause" justifying the seizure, the claimant to whom the goods are released is entitled to both costs and damages. If, on the other hand, there were suspicious circumstances justifying the seizure, the claimant is not entitled to either costs or damages. The reason is clear. It would be obviously unjust to compel a belligerent to pay damages or costs where he has done nothing in excess of his belligerent rights, and those rights justify a seizure of neutral property when it is in nature contraband and there is reasonable suspicion that it has an enemy destination. This may be thought hard upon the neutral owner, who will not be fully indemnified by a mere release of his property. So it is; but war unfortunately entails hardships of various kinds on neutrals as well as on belligerents. It follows that the real question to be decided on this appeal is whether, when the goods were seized, there were circumstances of suspicion justifying the seizure.

Some stress was laid by counsel for the appellants on the examples given by Sir William Scott and Sir John Nicholl in the letter above referred to of the circumstances under which seizure would be justified. All of them no doubt relate to suspicion arising either on the ship's papers or by reason of something done or omitted on the part of the master or crew. Their Lordships do not think that the writers of the letter intended their list of examples to be exhaustive, and it must be remembered that they wrote before the doctrine of continuous voyage had been applied either to contraband or to blockade. It is clear that the ultimate as opposed to the ostensible destination of goods would seldom, if ever, appear on the ship's papers or be

within the knowledge of the master or crew. It would have to be proved or inferred from other sources, and it could hardly be contended that if the Crown were in possession of evidence obtained from such other sources from which an ultimate destination in an enemy country could be inferred as reasonably probable, the seizure of the goods would not be justified.

The appellants further contended that in considering whether there were circumstances of suspicion which justified the seizure the Court must confine its attention to those circumstances for which the owner of the property seized is in some way responsible, and cannot take into consideration circumstances the existence of which is not due to any act or omission on the part of such owner or his agents or employees. Before considering this contention their Lordships think it better to state shortly the several facts on which the Crown relies as raising a reasonable suspicion that the 3000 bags in question had an ultimate destination in Germany.

Cocoa and chocolate are important foodstuffs. Both are manufactured from cocoa powder, itself the product of the cocoa bean. In manufacturing cocoa powder cocoa fat is also produced, and from cocoa fat glycerine is easily made, and this can be readily converted into nitro-glycerine, an essential ingredient in many high explosives. Thus 100 tons of cocoa beans give about 60 tons of cocoa powder and 25 tons of cocoa fat, which last will yield $2\frac{1}{2}$ tons of glycerine, and $2\frac{1}{2}$ tons of glycerine can be converted into 6 tons of nitro-glycerine.

Prior to the war Germany was importing annually about 55,000 tons of cocoa beans; this was approximately one-quarter of the world's annual production. The outbreak of war cut her off from nearly 85 per cent. of her supply. The result was serious. In spite of the measures taken by the German Government to obtain supplies from other sources, to secure economy and to regulate distribution, prices rose rapidly until by March, 1916, the price of cocoa in Berlin was eight or nine times its price in London. Under these circumstances there was every inducement to neutrals, and in particular to the neighbouring Scandinavian countries, to develop an export trade in cocoa beans or their products to the German Empire.

Turning now to Sweden, their Lordships find that prior to the war the imports of cocoa beans into Sweden were between 1600 and 1700 tons annually. There was no re-export trade to Germany. Since the outbreak of hostilities imports of cocoa beans

into Sweden have increased tenfold, and a re-export trade to Germany has been developed. During the first year of the war such re-export trade amounted to over 1200 tons, it being the regular practice to ship cocoa beans to Gothenburg in Danish steamers and to re-ship them thence to Germany. Besides this the imports of cocoa into Sweden have since the outbreak of the war largely increased, and there has developed a considerable export trade from Sweden to Germany in cocoa powder, cocoa, chocolate, and cocoa fat, an export trade which was non-existent before the war. The fact that before the war Sweden imported cocoa and chocolate from Germany, and since the war has been unable to do so, has little bearing on the inference suggested by the circumstances to which their Lordships have referred.

The position is therefore this. If the shipments of cocoa beans to Sweden be considered collectively, a considerable portion thereof must be destined for or find its way into Germany, either by the re-export to Germany of the beans themselves, or by the export to Germany of the various products of the beans. It must be remembered that in *The Balto*, [1917] P. 79, it was decided that an intention to export to an enemy country the manufactured products of imported raw material might bring a case within the doctrine of continuous voyage. The decision is not binding on this Board, but the appellants' counsel did not ask their Lordships to review it or question its validity in law. The appellants thus belong to a class of importers, some of whom must be engaged in a contraband trade, while others may not. It is impossible in any particular case to avoid suspicion or to predicate with regard to any particular importer that his intention is innocent.

But the matter does not stop there. It is not improbable that in the case of a reputable Swedish merchant His Majesty's Procurator-General might accept his assurance or guarantee that neither the beans in question nor their products were intended for export to Germany, but would be consumed in Sweden. But here, unfortunately, a difficulty is raised by the Swedish War Trade Law of April, 1916. According to that law it is unlawful for a Swedish subject to give any such assurance or guarantee without the consent of the Swedish Executive, and the Executive refuses to allow Swedish subjects to give any such assurance or guarantee with regard to the products of imported raw material. This law, or at any rate the way in which it is administered, has already on several occasions proved prej-

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udicial to the proper determination in the Prize Court, according to international law, of questions arising between the Crown and Swedish subjects. Only the other day the President struck out a claim on the ground that the claimant, a Swedish subject, refused, under order of his Government, to give the discovery which had been ordered by the Prize Court, and their Lordships felt unable to advise His Majesty to give leave to appeal from the President's decision. It is quite impossible for a Prize Court administering international law to accept the dictates of any municipal law as to what discovery ought or ought not to be insisted on either generally or in any particular case. The Prize Court can, however, protect itself, but this is not so with the Swedish subject. He is in a dilemma. Either he must act in contempt of the order of the Prize Court and so lose his case, which may be a perfectly good one, or he must prove his case to the Prize Court, and in so doing incur penalties under his own municipal law. The position is anomalous, but the anomaly is certainly not due to any defect in the practice of the Prize Court or in the law which it administers.

It appears that the assurance or guarantee given by the appellants prior to the seizure of the goods in question went only to the consumption in Sweden of the raw material, and said nothing about its products. It was only in the course of the subsequent proceedings before the Prize Court, when one of the directors of the appellant firm was examined orally, that evidence was adduced on this point, and this evidence, though accepted by the President as satisfactory, was not, in their Lordships' opinion, so conclusive as to make it unreasonable for the Crown to bring the case to trial. For example, it does not appear how the appellants dispose of the cocoa fat produced in the manufacture of cocoa or chocolate from the cocoa beans.

Their Lordships therefore conclude that, looking at all the known facts from the common-sense point of view, there were circumstances of suspicion calling for further inquiry, and amply sufficient to justify the seizure, so that the only remaining question on this part of the case is whether the appellants are right in their contention that these facts, or some of them, ought to have been disregarded altogether, because their existence was not due to any action or omission for which the appellants could be held responsible.

Their Lordships are of opinion that this contention is wholly untenable. The question in every case is whether circumstances

of suspicion exist, and not who is responsible for their existence. Thus the fact that documents are destroyed when search is imminent is a suspicious circumstance irrespective of the person responsible for the destruction, and whether this person acted on the instructions, or in the presumed interest, of the cargo owners or otherwise. Indeed, in the present case the question how far the appellants were responsible for the growth of the export trade from Sweden to Germany in cocoa beans or their products was precisely one of the questions requiring investigation, and would be of the utmost materiality in determining the ultimate destination of the goods in question. If responsibility has anything to do with it, it would seem that the appellants were responsible for the absence of any assurance or guarantee as to the products of the goods, although their omission in this respect was due to observance of their own municipal law; and further, a neutral cargo owner would appear to be quite as responsible for the actions of his own Government as he is for the action of the master or crew of the vessel on which the cargo is shipped. . . .

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

THE BONNA.

ADMIRALTY DIVISION (IN PRIZE) OF THE HIGH COURT OF JUSTICE OF
ENGLAND. 1918.

Law Reports [1918] P. 123.

In this case, which governed a number of others, the Procurator-General, on behalf of the Crown, claimed the condemnation of 416 tons of cocoanut oil seized at Bristol on August 27, 1916, *ex* the Norwegian steamship *Bonna*.

The claimants, the *Nya Margarin AB. Svea*, of Kalmar, Sweden, claimed the release of the oil on the ground that it had been bought by them for the purpose of the manufacture, in their own factory, of margarine for sale and consumption in Sweden.

The case is reported on the alternative question argued on behalf of the Crown that, assuming the claimants established that the oil was destined solely for the Swedish factory, it

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should be deemed to have an enemy destination on the ground that it helped to form part of a reservoir of edible fats part of which went to Germany, or that the margarine manufactured from it would, to the knowledge of the claimants, be consumed in Sweden in substitution for butter exported to Germany. On this latter point it appeared from an affidavit by the Controller of the War Trade Statistical Department that before the war Sweden exported about 76 per cent. of her surplus butter to the United Kingdom and Denmark, and that the quantity exported to Germany was 2.3 per cent. After the outbreak of war the export to the United Kingdom, and in a lesser degree to Denmark, decreased, until by June, 1916, it had dwindled to less than 0.4 per cent., while Germany was receiving 98 per cent. of the total export. During the second half of 1916 large quantities of edible fats and oils suitable for margarine manufacture were seized as prize, with the result that, whereas in July, 1916, 1716 tons of butter were exported, 1701 of which went to Germany, in December, 1916, less than one ton was exported, and from January to October, 1917, only one and a half tons were exported to Germany. . . .

THE PRESIDENT (SIR SAMUEL EVANS). . . . Apart from these questions of fact, counsel for the Crown rested their case upon a broader ground. Statistics were given in evidence to show the increase of the importation into Sweden of raw materials for margarine and of the production and sale of margarine, and to show the simultaneous increase of the export of butter from Sweden to Germany. They were interesting, and beyond doubt they proved that the more margarine was made for the Swedes the more butter was supplied by them to the Germans; and that when by reason of the naval activity of this country the imports of margarine production became diminished, the Swedish butter was kept for consumption within Sweden itself and ceased to be sent to the enemy.

Upon these facts counsel for the Crown formulated and founded their logical proposition. That proposition may be translated in practical terms, in relation to the facts of this case, perhaps more usefully than if it were stated in abstract language. So translated it may be stated thus: "Margarine and butter are of the same class of food, one being used as a substitute for, or even as an equivalent of, the other. Margarine was produced in Sweden—by the claimants among others—

with the result that, to the knowledge of the manufacturers, the butter of the country was being sent to Germany, where it would pass under the control of the Government. There was, so to speak, one reservoir of the edible fats, butter and margarine. As one part of the contents—the butter—was conveyed away for consumption in Germany, the other part—margarine—was sent in to take its place for consumption in Sweden. If the one part could be captured as conditional contraband, the other was subject to capture also; and not only that part when completely manufactured, but the raw materials for it as well.”

No authority was, or could be, adduced for the proposition formulated in such an argument; but it was contended, nevertheless, that it logically followed principles recognized by international law.

Before pronouncing the decision of the Court I think it right to say that, if it were established that raw materials were imported by a neutral for the manufacture of margarine with an intention to supply the enemy with the manufactured article, I should be prepared to hold that the doctrine of continuous voyage applied so as to make such raw materials subject to condemnation as conditional contraband with an enemy destination.

I should go even further and hold that, if it were shown that in a neutral country particular manufacturers of margarine were acting in combination with particular producers or vendors of butter, and that the intention and object of their combination was to produce the margarine in order to send the butter to the enemy, the same doctrine would be applicable with the same results.

But there is a long space between those two supposed cases and the one now before the Court; and this space, in my view, cannot be spanned by the application of the accepted principles of the law of nations.

I do not consider that it would be in accordance with international law to hold that raw materials on their way to citizens of a neutral country to be converted into a manufactured article for consumption in that country were subject to condemnation on the ground that the consequence might, or even would, necessarily be that another article of a like kind, and adapted for a like use, would be exported by other citizens of the neutral country to the enemy.

I therefore allow the claim, and order that the goods seized, or the proceeds if sold, be released to the claimants.

THE LOUISIANA AND OTHER SHIPS.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1918.
Law Reports [1918] A. C. 461.

Appeals from decrees of the President of the Probate, Divorce and Admiralty Division (in Prize). . . .

The appeals, which were heard together, were by two American companies and an American citizen against decrees condemning conditional contraband goods, namely fodder stuffs, shipped by them in the neutral steamships Louisiana, Tomsk, Nordic, and Joseph W. Fordney. The goods were shipped from the United States in March, 1915, under bills of lading which made them deliverable in each case at a Swedish port to, in the case of the Nordic, W. Fritsch, and in the other cases E. Klingener. Fritsch and Klingener were Swedish subjects and traders. In each case the bills of lading were forwarded by the appellant or appellants to the Danish firm of Christensen & Schrei, who carried on business at Copenhagen. The ships were diverted to a British port and the goods were there seized in April and May, 1915. The appellants claimed the goods alleging that they were their property respectively, and were not intended for disposal to any belligerent State. In the first three appeals the claimants alleged that Christensen & Schrei were their agents for sale; in the last appeal it was alleged that that firm had ordered the goods for Klingener.

The President (Sir Samuel Evans) on June 9, 1916, condemned the goods. He found in the case of each shipment that the goods were intended for, and had been acquired for, the German Government; and that Klingener, Fritsch, and Christensen & Schrei were merely intermediary tools.

LORD PARKER OF WADDINGTON. These four appeals relate to certain fodder stuffs (being part of the cargoes of the steamships Louisiana, Tomsk, and Nordic, and the whole cargo of the steamship Joseph W. Fordney) which were seized on behalf of His Majesty in April and May, 1915, and have been condemned by the President as lawful prize. Each appeal is against the order of condemnation.

Fodder stuffs are not absolute contraband. They are conditional contraband only, that is to say, they cannot be condemned as lawful prize unless destined for the enemy Government or the

enemy's naval or military forces. On the other hand, in determining this destination, the doctrine of continuous voyage is clearly applicable, and must be applied in every case in which the Crown has not waived its strict rights. The first question, therefore, in each appeal is whether the goods to which the appeal relates were destined for the enemy Government or the enemy's naval or military forces. The second question is whether, if so destined, the Crown has not, as contended by the appellants, waived its right to condemnation by the Order in Council of October 29, 1914, adopting during the present hostilities the provisions of the Declaration of London with certain additions and modifications, this Order, though since repealed, having been in force when the goods were seized.

In considering cases such as those with which their Lordships have now to deal, it is well to bear in mind that, according to international law, neutrals may during a war trade freely as well with the belligerents as with other neutrals. If, however, the goods in which they trade are in their nature contraband, the traffic involves certain risks. For a belligerent State is entitled to seize the goods in transit on reasonable suspicion that, being in their nature absolute contraband, they are destined for the enemy country, or, being in their nature conditional contraband, they are destined for the enemy Government or the enemy naval or military forces. The goods when seized must of course be brought into the Prize Court for adjudication, but in the Prize Court the neutral trader is not in the position of a person charged with a criminal offence and presumed to be innocent unless his guilt is established beyond reasonable doubt. He comes before the Prize Court to show that there was no reasonable suspicion justifying the seizure or to displace such reasonable suspicion as in fact exists. The State of the captors is necessarily unable to investigate the relations between the neutral trader and his correspondents in enemy or neutral countries, but the neutral trader is or ought to be in a position to explain doubtful points. If his goods had no such destination as would subject them to condemnation by the Prize Court, it is his interest to make full disclosure of all the details of the transaction. Only if his goods had such destination can it be his interest to conceal anything or leave anything unexplained. If he does not conceal matters which it is material for the Court to know, or if he neglects to explain matters which he is or ought to be in a position to explain, or if he puts forward un-

satisfactory or contradictory evidence in matters the details of which must be within his knowledge, he cannot complain if the Court draws inferences adverse to his claim and condemns the goods in question.

In each of these appeals their Lordships find that the evidence discloses no such simple story supported by documents as one would expect in the case of straightforward transactions between neutrals in America and neutrals in Sweden or Denmark. The position of almost every person concerned is obscured in a cloud of mystery. The evidence is in some points insufficient and in others conflicting or misleading, and the several claimants have thought fit to leave entirely unexplained a number of circumstances which urgently call for explanation.

The cases of the part cargo *ex* steamship Louisiana and the part cargo *ex* steamship Tomsk may be taken together, and their Lordships note the following points:—

1. The position of Klingener in the case of the shipment per steamship Louisiana and of Fritsch in the case of the shipment per steamship Tomsk, is by no means clear. According to the appellants' manager, Mr. Harry B. Smith, these gentlemen were named as consignees in the bills of lading on the initiative of the appellants themselves, because it was thought that insurance companies required that there should be a named consignee resident in the country of the port of ultimate discharge. The appellants certainly gave Christensen & Schrei a guarantee that Klingener and Fritsch would indorse and deal with the bills as required by them. On the other hand, Klingener and Fritsch say that it was Christensen & Schrei who asked them to accept the respective consignments; but Christensen & Schrei do not confirm this story. There is no evidence that the appellants had any prior transactions with either Klingener or Fritsch, or how the appellants came to know of the existence of either of them. It is, however, quite certain that neither Klingener nor Fritsch had any real interest in the transaction nor any duty beyond indorsing and dealing with the bills as directed either by Christensen & Schrei or the appellants, or possibly some one behind the appellants.

2. It appears that Christensen & Schrei originally claimed to be owners of the goods. In the case of the shipment per steamship Louisiana, this claim was first put forward on their behalf by the Danish Minister on April 25, 1915, in a letter to Sir Edward Grey. In their declaration made on July 15, 1915, to

the Danish Ministry of Commerce they refer to the goods as having been "purchased and consigned to" them. The meaning of this is obscure. It looks at first sight as if they meant to suggest, though without saying this in so many words, that they had purchased the goods; but this is inconsistent with the correspondence annexed to the declaration. To what purchase they refer remains a mystery. In their subsequent affidavit they in effect say there was no purchase, the goods having remained throughout the property of the appellants. Their own claim to ownership was thus abandoned.

3. The case ultimately put forward was that Christensen & Schrei were the appellants' agents for the sale of the goods in question on the Scandinavian markets, but there appears to have been no formal contract of agency, nor any arrangement as to how the agents were to be remunerated. Indeed, the transactions in question were the first transactions between the appellants and Christensen & Schrei, whose address had been obtained by the appellants from a firm in New York whose name is not disclosed. Assuming that Christensen & Schrei were agents for sale, their authority to sell would appear to be in the nature of a simple mandate revocable at will by the appellants. In case of such a revocation, Christensen & Schrei would be bound to deal with the bills of lading, or the goods represented by these bills, in manner directed by the person entitled to revoke the authority.

4. Though the appellants are claiming as owners, it is remarkable that Mr. Harry B. Smith does not anywhere in his affidavit commit himself to the statement that his company ever at any material time owned the goods. The bills of lading, after indorsement by Klingener and Fritsch, appear to have been sent to him by Christensen & Schrei, and he says that his company is the holder or owner of the bills of lading and entitled to the immediate possession of the goods. But the "ownership" of a bill of lading, in the sense of holding it with a right to possession, which is what the affidavit seems to mean, does not always connote ownership of the goods comprised in the bill, and his affidavit is quite consistent with the ownership being in a third party on whose directions the appellants had acted throughout. It is also to be observed that Mr. Harry B. Smith does not state who forwarded the bills to Christensen & Schrei. He merely states that they were duly forwarded. It is left to Christensen & Schrei to depose to the appellants' ownership of the goods, as

to which they would not necessarily know anything, and as to the appellants having forwarded the bills to them. In the case of the shipment per steamship Louisiana they produced a letter from the appellants enclosing the bills, but they produced no letter covering the bills in the case of the shipment per steamship Tomsk. In the latter case there is reason to suppose that the bills were so forwarded by the firm of K. & E. Neumond, of New York, who are admitted to have made some of the arrangements in connection with the shipment, though it does not appear in what capacity. This firm obtained the bills of lading per steamship Tomsk, from the agents for the ship, and, in consideration of the bills omitting reference to the fact that some of the bags had been torn and mended, gave the guarantee printed in the record. The connection of K. & E. Neumond with the transaction is wholly unexplained. Christensen & Schrei claim to have been their selling agents in Europe. This seems to suggest that K. & E. Neumond, and not the appellants, were in real control of the business in America. If, as originally declared by Christensen & Schrei, the goods had been purchased at all, that firm may well have been the purchasers, either on their own account or as agents for some one else.

5. That there was some one behind the appellants is rendered certain by the two wireless messages of April 1 and 9, 1915, from the Guaranty Trust Company, of New York, to the Disconto-Gesellschaft, Berlin. In the first the Guaranty Trust Company tell their Berlin correspondent that the shipment per steamship Louisiana is being forwarded by them on account of "Albert." In the second the Guaranty Trust Company tell their Berlin correspondent that the shipment per Tomsk is being forwarded by them on account of "Albert" to Christensen & Schrei.

6. Mr. Greenwood, in his affidavit on behalf of the Crown, states certain facts which inevitably lead to the inference that the "Albert" mentioned in these messages was Heinrich Albert, a well-known agent of the German Government in the United States, who appears to have been acting through K. & E. Neumond, to whom he had been recommended by Christensen & Schrei, and to have been financed by the Disconto-Gesellschaft, of Berlin, through the Guaranty Trust Company, of New York. The appellants, who must be fully aware of the connection of Heinrich Albert, K. & E. Neumond, the Disconto-Gesellschaft, and the Guaranty Trust Company with the transaction in ques-

tion, have chosen to leave this connection entirely unexplained and Mr. Greenwood's affidavit entirely unanswered.

Under the circumstances above mentioned, the only possible conclusion is that the shipments per Louisiana and Tomsk were made by or on behalf of the German Government through its agents in America, and that the details of the transactions were so arranged as to conceal the fact.

In considering, on the principle of continuous voyage, what is the ultimate destination of goods which are in their nature conditional contraband, it is the intention of the person who is in a position to control the destination which is really material. Had Klingener and Fritsch had any real interest, it might have been their intention which mattered. Had Christensen & Schrei purchased the goods, or even had they obtained possession of the bills of lading under circumstances which entitled them to dispose of the goods, notwithstanding orders to the contrary from the appellants, or some one for whom the appellants were acting, the intention of Christensen & Schrei would have been a material point. Had the appellants been dealing with their own goods on their own behalf, their intention might have been the determining factor. But if, as their Lordships find, the appellants were acting by the direction of an agent of the German Government, it is the intention of the German Government which must be looked for. It would be ridiculous to suppose that the German Government were speculating in fodder stuffs for the Scandinavian markets. These stuffs were urgently needed in Germany for the purposes of the war, and the only possible inference is that the goods in question were intended to reach Germany and be utilized for war purposes. It is true, no doubt, that the municipal laws of both Denmark and Sweden prohibit the export of fodder stuffs, but it is not clear that this prohibition includes transshipment at Danish or Swedish ports, or that licences for export are not readily granted by the Danish or Swedish authorities, at any rate if the stuffs in question are not really needed for home consumption. The experience of the Prize Court during the war has made it clear that the laws referred to, however stringent, can be evaded.

Their Lordships come to the conclusion that the President was fully justified in finding that the shipments per steamship Louisiana and Tomsk were destined for the German Government.

[Their Lordships' judgment then dealt with the evidence as

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to the shipments in the *Nordic* and *Joseph W. Fordney*, as to which they also came to the conclusion that "the President was right in finding that the goods were destined for the enemy Government"; the judgment continued as follows:]

The remaining point to be considered is whether the Crown has or has not by the Order in Council of October 29, 1914, waived its right to the condemnation of the goods the subject of these appeals.

The Declaration of London was a provisional agreement embodying certain somewhat sweeping changes in international law. Its 35th article in effect entirely abrogates the doctrine of continuous voyage in the case of conditional contraband. Parliament refused to consent to its ratification, and it never became binding on this country. It was, however, by Order in Council dated August 20, 1914, adopted by His Majesty for the period of the present war with certain additions and modifications. By one of these modifications it was provided that, notwithstanding art. 35, conditional contraband, if shown to be destined for the armed forces or a Government department of the enemy State, should be liable to capture to whatever port the vessel was bound or at whatever port the cargo was to be discharged. This modification, in effect, neutralized art. 35, and the doctrine of continuous voyage remained as applicable to conditional contraband as it had been before the Order.

The application of the doctrine of continuous voyage to conditional contraband appears to have given rise during the earlier months of the war to certain diplomatic representations on the part of the United States. These representations are said to have led to the repeal of the Order of August 20, 1914, and to the substitution therefor of the Order in Council of October 29, 1914. By this last-mentioned Order the Declaration of London was again adopted by His Majesty for the period of the present war with certain additions and modifications. The material modification, however, now provided that notwithstanding art. 35 of the Declaration, conditional contraband should be liable to capture on board a vessel bound for a neutral port (1.) if the goods are consigned "to order," or (2.) if the ship's papers do not show who is "the consignee of the goods," or (3.) if they show "a consignee of the goods" in territory belonging to or occupied by the enemy. The effect of the Order is therefore to waive the doctrine of continuous voyage except in those cases expressly referred to in the modification. The appellants con-

tend that none of the goods in question in these appeals can be brought within any of the cases referred to. None of the goods were consigned "to order." The bill of lading, which formed one of the ship's papers, showed in every instance who was the consignee of the goods, and neither the bill of lading nor any other of the ship's papers showed in any instance a consignee of the goods in territory belonging to or occupied by the enemy.

Their Lordships are of opinion that this contention cannot be sustained. It assumes that the words "if the ship's papers do not show the consignee of the goods" mean "if the ship's papers do not show a consignee of the goods." But on this interpretation there is no difference between the first case and the second, for a bill of lading which does not show a consignee is in effect for present purposes a bill to order. Further, the reason for not waiving the doctrine of continuous voyage in the case of consignments to order can only have been that in the case of such consignments the shipper retains the control of the goods, and can alter their destination as his interests may dictate or circumstances may admit. This control may, however, be retained by the shipper, even if he consigns to a named person, provided that the consignee be bound to indorse or otherwise deal with the bill of lading as directed by the shipper. It would be useless to retain the doctrine of continuous voyage in the case of consignments to order, if the shipper could escape the doctrine by consigning to a clerk in his office and procuring the clerk to indorse the bill. He would in this manner retain as full control of the goods as if the consignment had been to order. It is impossible, in their Lordships' opinion, to construe the Order as an intimation to neutrals that, provided they make their consignment to named persons not residing in territory belonging to or occupied by the enemy, they may, in the case of conditional contraband, safely disregard the doctrine of continuous voyage. If the Order were so construed, the modification of art. 35 would be absolutely useless, and conditional contraband could be supplied to the enemy Government through neutral ports as freely as if art. 35 had been adopted without any modification at all. In their Lordships' opinion the words "the consignee of the goods" must mean some person other than the consignor to whom the consignor parts with the real control of the goods. It is said that such a construction would defeat the object in view, which must have been to make some concession for the benefit of neutral traders. But even if construed

as in their Lordships' opinion it ought to be construed, the effect of the Order is to make a considerable concession. Under it merchants in one neutral country can, without risking the condemnation of their goods, consign them for discharge in the ports of another neutral country to the order of buyers or others to whom the principal in the ordinary course of business finally transfers the control of the goods. They are not concerned to inquire how such buyers or other persons intend to deal with the goods after delivery. No intention on the part of the latter to forward the goods to the enemy Government will render the goods liable to condemnation. This is no small concession.

In no one of the present appeals would the named consignee have had any real control over the goods consigned to him. In each case the named consignee was a mere agent for some one else and bound to act as that some one, whoever he might be, should direct. Under these circumstances their Lordships hold that the named consignee was not "the consignee of the goods" within the meaning of the Order in Council.

Each of these appeals must therefore, in their Lordships' opinion, be dismissed with costs, the costs of the petition to admit the supplemental record, in the case of the part cargo *ex* steamship *Louisiana* being made costs in that appeal. Their Lordships will humbly advise His Majesty accordingly.

THE NOORDAM.

ADMIRALTY DIVISION (IN PRIZE) OF THE HIGH COURT OF JUSTICE OF
ENGLAND. 1918.

Law Reports [1919] P. 57.

Suit for condemnation of cargo as contraband destined for Germany.

Under a bill of lading dated March 16, 1916, nine bales of cotton piece goods were shipped by Amory, Browne & Co., of New York, wholesale exporters of cotton goods, on the Dutch steamship *Noordam* for carriage to Amsterdam. The goods were consigned to the Netherlands Oversea Trust Co. [a body of Dutch traders of repute who agreed with the British Government to act as intermediaries for the purpose of obtaining from

abroad goods consigned to Holland for Dutch consumption], for the firm of S. I. De Vries of Amsterdam to whom Amory, Browne & Co. had sold the goods through a Dutch agent in the ordinary way of business. Cotton piece goods "capable of being used in the manufacture of explosives" were made absolute contraband on October 14, 1915. In the course of her voyage the Noordam was detained at Falmouth pending inquiry as to her cargo, and ultimately was allowed to proceed on condition that the goods in question were returned to a British port to be placed in prize: Consequently the buyers refused to take up the shipping documents or to honour the draft for the invoice value, and the property in the goods remained in Amory, Browne & Co. A claim was put in on behalf of Messrs. De Vries, but was abandoned, and a claim by Amory, Browne & Co. was substituted.

The Crown did not allege that the claimants intended or knew that the goods were to be sent on to Germany. The evidence, however, was that Messrs. De Vries sold large quantities of cotton goods to buyers in Germany, a fact they had endeavored to conceal when their books were examined by accountants on behalf of the Cotton Export Committee; and the case for the Crown, therefore, was that if the goods had arrived in Holland Messrs. De Vries would have resold them to Germany if they could have evaded the vigilance of the Netherlands Oversea Trust Co., which it was admitted would have exacted guarantees as to neutral consumption, and have prevented the goods being forwarded to Germany if it could.

The claimants contended that in these circumstances the doctrine of continuous voyage did not apply, and that the goods could not be condemned. . . .

THE PRESIDENT (LORD STERNDAL): . . . I have no hesitation whatever in saying, on these facts, that if these goods had got into De Vries' hands they would, if De Vries could possibly have managed it, have got into Germany, and that the intention of De Vries in getting them was to send them into Germany if they could. It may be that the Netherlands Oversea Trust Co. might have been able to prevent that; it may be that all their precautions would have failed and De Vries would have got them into Germany.

It was argued, however, on behalf of the claimants, that whatever De Vries' intention may have been was immaterial because, in order to bring in the doctrine of what is called "con-

tinuous voyage," and therefore to affect these goods by the enemy destination, it must be shown that the shippers were parties to it; that if the shippers were innocent this doctrine could not be applied and these goods could not be condemned, because—as I understand the argument—a continuous voyage must be considered as that which the shipper sets in motion, and which he intends should have one or other destination. That contention does not seem to me to be sound. I do not think the enemy destination—which is a fact—can depend upon the intention of the shipper when he puts the goods on board. The doctrine was stated in *The Axel Johnson*, [1917] P. 234, 238, by the late President in the words of the Declaration of London, and the comment of Monsieur L. Renault upon it, which the learned President said he adopted. The Declaration of London states: "Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land." Monsieur Renault's comment upon it is: "The articles included in the list in art. 22 are absolute contraband when they are destined for territory belonging to or occupied by the enemy, or for his armed military or naval forces. These articles are liable to capture as soon as a final destination of this kind can be shown by the captor to exist. It is not, therefore, the destination of the vessel which is decisive, but that of the goods. It makes no difference if these goods are on board a vessel which is to discharge them in a neutral port. As soon as the captor is able to show that they are to be forwarded from there by land or sea to an enemy country, it is enough to justify the capture and subsequent condemnation of the cargo. The very principle of continuous voyage, as regards absolute contraband, is established by art. 30. The journey made by the goods is regarded as a whole." In the statement of the doctrine in *The Kim*, [1915] P. 215, 275, the late President said: "I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage, or transportation, both in relation to carriage by sea and to carriage over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognized legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare. The result is that the Court is not restricted

in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen; but is entitled, and bound, to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible, and, if so, what the real ultimate destination was. As to the real destination of a cargo, one of the chief tests is whether it was consigned to the neutral port to be there delivered for the purpose of being imported into the common stock of the country." Then the learned President discusses the cases on that point.

It seems to me also that this question really arose in *The Beira* (unreported), which also came before the late President. It concerned a number of cases of sardines, some shipped on the *Beira* and some on another ship. The shipper in that case was a gentleman who resided in Lisbon, but apparently had no knowledge of the intention of the consignee, who was agent for an enemy firm, to send the goods to an enemy country. In that case the claim was made by the shipper, but he had discounted the bills of lading with a Lisbon bank, and it did not appear that he had reserved any right to the disposition of the goods. That seems to me to be immaterial. The learned President held that the goods must be condemned because they were destined for an enemy country. In that case the goods were conditional contraband intended for a base of supply or the armed forces of the enemy. That question of course does not arise here.

I think the same conclusion is really involved in the decision of the Privy Council, which was delivered lately in *The Kronprinzessin Victoria*, [1919] A. C. 261. In that case it was held that the consignees were not "dummy consignees" not acting under the control of the shipper, but were persons who had bought the goods for the purpose of getting them into an enemy country. It was held that the transaction was protected by the Declaration of London as modified by the Order in Council of October 29, 1914. But if the argument before me had been sound it seems to me it would have been quite immaterial to consider that at all, because there would have been no continuous voyage of the goods. It is similar to the case now before me—the shippers not retaining control of the goods after arrival and delivery to the consignees, who bought them for the purpose of getting them to an enemy country. The Privy Council assumed that the goods under those conditions would be liable to condemnation unless they were protected by the Declaration of

London as modified by the Order in Council. Therefore it really does involve the same question, it seems to me, because those matters of the Declaration of London and the Order in Council are quite irrelevant when the Court is dealing with absolute contraband.

The only matter—I do not know that this point was really urged upon me very much—which it seemed to me might raise a doubt was that the consignment was to the Netherlands Oversea Trust Co. There is no question that the Netherlands Oversea Trust Co. are doing what is absolutely right, and no doubt they would have done what they could to prevent these goods reaching Germany. But I do not think that that is material. The question is, what is the ultimate destination, what is the destination intended by the person who will have the control of the goods when they arrive? If they had arrived at the neutral port De Vries would have had the control, subject to this, that they would have had to give undertakings to the Netherlands Oversea Trust Co. that they would not send the goods into an enemy country. But De Vries were the purchasers; they would have become the owners of the goods, and their intention, I have no doubt, was to send them into enemy countries. If that be so, in my opinion it cannot be said that there is not an enemy destination simply because some association, such as the Netherlands Oversea Trust Co., would do all they could to frustrate it.

For these reasons I think the goods must be condemned as good and lawful prize. It is hard, I know, upon shippers who are innocent. But unfortunately the exercise of legal rights does from time to time inflict hardship upon others. That, however, is no reason why I should refrain from saying what I think is the proper conclusion to be come to in regard to these goods. . . .

NOTE.—The doctrine of continuous voyage, which might perhaps be more accurately described as the doctrine of enemy destination, originated in attempts to evade the famous Rule of 1756 by which neutrals are forbidden to participate in a trade from which they were excluded in time of peace. The doctrine has often been ascribed to Lord Stowell, but it was applied by English judges long before his time. See *The Africa* (1762), Burrell, 228, and *The St. Croix* (1763), Burrell, 228. For early discussions of the doctrine in reference to prohibited trade see *The Welvaart* (1799), 1 C. Robinson, 122; *The Polly* (1800), 2 Ib. 361; *The Maria* (1805), 5 Ib. 365; *The Johanna Tholen* (1805), 6 Ib. 72; *The Ebenezer* (1805), 6 Ib. 250; and *The*

Thomyris (1808), 1 Edwards, 17. In the first cases the court was not exacting as to the evidence that the intermediate port was the bona fide terminus of the voyage. Landing of the cargo and payment of duty were especially regarded as conclusive. But the profits in such transactions were so great and the volume of business became so large that in *The Essex*, decided by the Lords of Appeal in 1805 (5 C. Robinson, 368), the court declined to accept such evidence as conclusive, and the better known case of *The William* (5 C. Robinson, 395) established the rule which has ever since been followed. The doctrine of enemy destination was next extended to vessels trading with the enemy, *The Jonge Pieter* (1801), 4 C. Robinson, 79; *The Matchless* (1822), 1 Haggard, 97, 106; *The Eliza Ann* (1824), 1 Haggard, 257; *Jecker v. Montgomery* (1855), 18 Howard, 110, 114; *The Mashona* (1900), Cape of Good Hope, 17 S. C. R. 135.

The case of *The Jesus*, which arose in the Admiralty Court in 1756, and was appealed to the Lords of Appeal in 1759 and decided by them in 1761, shows that the principle of final destination as applied to contraband cargoes was known to the judges of that day. Burrell, 164. See also the decisions of Lord Stowell in the *Twende Brodre* (1801), 4 C. Robinson, 33, and *The Eagle* (1803), 5 C. Robinson, 401. A better known instance of its application to the transportation of contraband occurred in the case of *The Frau Anna Howina* (1855), decided by the French Prize Court in the Crimean War. See Calvo, V. sec. 2767. This decision seems to have attracted little attention and when the same question was raised in the prize courts in the American Civil War, it was never cited.

The doctrine of enemy destination in connection with blockades was hinted at in several cases which arose in the Napoleonic wars, e. g., *The Maria* (1805), 6 C. Robinson, 201; *The Lisette* (1807), 6 Ib. 387; *The Mercurius* (1808), 1 Edwards, 53; but except possibly in the case of *The Charlotte Sophia* (1806), 6 C. Robinson, 204n, a case imperfectly reported, no vessel was condemned on that ground until the American Civil War. American cases besides *The Peterhoff* and *The Springbok* applying the doctrine either to the carriage of contraband or the breach of blockade (the two are not always distinguished) are *The Dolphin* (1863), 7 Fed. Cases, 862; *The Pearl* (1863), 19 Ib. 54; *The Stephen Hart* (1863), Blatchford, Prize Cases, 387 (the most elaborate discussion of the subject in the books); *The Circassian* (1864), 2 Wallace, 135; *The Bermuda* (1866), 3 Wallace, 514.

The doctrine of continuous voyage or enemy destination was applied in the Chino-Japanese War of 1894-1895, when the British mail steamer *Gaelic*, en route from San Francisco to the British port of Hong-Kong, made a regular stop at Yokohama and was searched by the Japanese authorities because suspected of carrying persons who were on their way to enter the Chinese service. See Takahashi, *Cases on International Law during the Chino-Japanese War*, xvii, 52; Westlake, *Collected Papers*, 461. In 1896, the *Doelwijk*, a Dutch ship with a cargo of arms, was captured on the high seas by an Italian cruiser and in the first prize case heard in the new kingdom of Italy

was condemned by the Italian Prize Court at Rome on the ground that the cargo was to be landed at Djibouti, a French port, for shipment overland to Abyssinia with which Italy was then at war. See articles by M. Prosper Fedozzi in *Revue de Droit International*, XXIX, 55, 75-80, and by M. Giulio Diena in *Journal du Droit International Privé*, XXIV, 268; Pillet, *Les Lois Actuelles de la Guerre*, sec. 216. The decision of the Italian Prize Court is printed in 2 *Commercial Cases*, 202. There was an important discussion of the doctrine of continuous voyage at the time of the South African War in connection with the seizure by British cruisers of the *Bundesrath* and other German vessels bound for the neutral Portuguese port of Lorenzo Marques on Delagoa Bay. It was through this port that the Boer republics, which had no seacoast, were obliged to carry on their commerce with the outside world. The British Government was unable to show that the cargoes of the German vessels were such as to justify their detention, but in the discussion of the legal questions involved, Lord Salisbury adopted the views set forth in the American decisions and quoted the German jurist Bluntschli to the effect that if the ships or cargoes are sent to a neutral port only to facilitate their reaching the enemy they are contraband and subject to confiscation. Moore, *Digest*, VII, 739. In the Turco-Italian War in 1912 an Italian cruiser seized the French steamer *Carthage*, bound from France to the French colony of Tunis, because it had on board an aeroplane alleged to be intended for the Turkish forces in Tripoli. The case was submitted to the Permanent Court of Arbitration at The Hague, which decided that there was insufficient evidence to establish the hostile destination of the aeroplane. See Wilson, *The Hague Arbitration Cases*, 352. The first application of the doctrine of enemy destination in the Great War seems to have been made by the British Prize Court in Malta in the case of *The Venizelos*, decided July 15, 1915. A cargo of food on a neutral vessel consigned by way of an Italian port to a commercial house in Switzerland was condemned as conditional contraband since the claimants were unable to prove that the goods had an innocent destination. See *Journal of the Society of Comparative Legislation*, (N. S.) XVI, 70. On July 8, 1916, there was published in the London Gazette an Order in Council setting forth various principles of prize law to be observed. Among them was this:

The principle of continuous voyage or ultimate destination shall be applicable both in cases of contraband and blockade.

After the decision of Sir Samuel Evans in *The Kim*, the doctrine of enemy destination was applied to a great variety of situations. The close proximity to Germany of such neutral maritime states as Holland, Denmark, Norway and Sweden and the enormous increase in exports from those countries to Germany led to the establishment of the rule in both England and France that neutral consignees must prove that goods consigned to them did not have an enemy destination. *The Hillerod* (1917), L. R. [1918] A. C. 412; *The Insulinde* (France, 1915), *Revue General de Droit International*, XXII, 18 J. An

intent to submit conditional contraband goods to public auction in the neutral country to which they are consigned does not relieve the claimant of the burden of proving that the goods do not have an enemy destination, *The Norne* (1921), L. R. [1921] 1 A. C. 765. A claimant may be obliged to exhibit his books in order to show the increase in the volume of his trade to Germany, *The Consul Corfitzon* (1917), L. R. [1917] A. C. 550. A cargo of wool (absolute contraband) consigned to a neutral firm in Sweden but intended to be sent to Germany for combing and then returned to Sweden for manufacture was condemned on the ground that it was on its way to enemy territory even though that was not its ultimate destination, *The Axel Johnson* (1921), L. R. [1921] 1 A. C. 473.

For the effect of the transshipment of a cargo belonging to a neutral from an enemy to a neutral ship in a neutral port, see *The Rijn* (1917), L. R. [1917] P. 145. As to the status of raw materials consigned to a neutral country where they are to be made into goods for the enemy see *The Balto* (1917), L. R. [1917] P. 79. The devices resorted to by Germany to import goods from America through neutral countries are well described by means of intercepted and decoded letters in *The Dirigo* (1919), L. R. [1919] P. 204.

The doctrine of enemy destination was applied by the German prize courts in the Great War. A Danish steamer bound to Copenhagen with a cargo part of which was destined to Germany was stopped by a British cruiser, and was allowed to proceed to Denmark in order to unload the goods bona fide destined for Denmark but was required to give a bond that it would return to England with the cargo intended for Germany. On the way to Denmark it was captured by a German cruiser, and its cargo was condemned on the ground that the bond which compelled the vessel to return to England gave it an enemy destination, *The Kiew* (1917), *Entscheidungen*, 241. See also *The Brage* (1917), *Ib.* 267; *The Lupus* (1917), *Ib.* 377; *The Mjölnir* (1917), *Ib.* 421.

In view of the decision of the French Prize Court in *The Frou Howina*, of the Italian Prize Court in *The Doelwijk*, and of the British Prize Courts in *The Kim* and other cases, and of the German Prize Courts in several cases, and in view of the position taken by Japan in the case of *The Gaelic*, by Great Britain in the case of *The Bundesrath* and in her Orders in Council of July 8, 1916, and by Italy in the case of *The Carthage*, the much reviled decision in the case of *The Springbok* may now be regarded as established law.

The doctrine of enemy destination is closely analogous to the rule followed by the American courts in determining whether a particular transaction is or is not interstate commerce. Just as the claimants in *The William* tried to divide one voyage into two by transshipment at an intermediate port, so shippers on American railways have tried to break up an interstate transaction into its component parts in order to make it appear to be an intrastate shipment. It is well settled, however, that whenever a commodity begins to move in interstate commerce it becomes a part of interstate commerce and falls under Federal jurisdiction even though it has not yet passed from

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the State of origin, *The Daniel Ball* (1871), 10 Wallace, 557, 565. A shipment which is really interstate will be treated as such, regardless of the agencies employed or the form of the bill of lading, *Railroad Commission of Louisiana v. Texas & Pacific Ry.* (1913), 229 U. S. 336; *Baer Brothers Mercantile Co. v. Denver & Rio Grande Ry.* (1914), 233 U. S. 479.

The literature of the doctrine of continuous voyage or enemy destination is extensive. In an unusually careful article "Early Cases on the Doctrine of Continuous Voyages" in *Am. Jour. Int. Law*, IV, 823, Mr. L. H. Woolsey showed that the doctrine did not originate with Lord Stowell but was applied by British Prize Courts in the Seven Years' War. See also C. B. Elliott, "The Doctrine of Continuous Voyages," *Id.*, I, 61, C. N. Gregory, "The Doctrine of Continuous Voyage," *Report of 26th Conference, Int. Law Assoc.*, 120; *Int. Law Topics*, 1905, 77; *Int. Law Sit.* 1910, 90; Westlake, *Collected Papers*, 461; Baty, *Int. Law in South Africa*, 144; Pyke, *The Law of Contraband of War*, ch. xii; Pyke, "The Kim Case," *Law Quarterly Review*, XXXII, 50; Cobbett, *Cases and Opinions*, II, 466; Bonfils (Fauchille), sec. 1567; Hyde, II, 602; Moore, *Digest*, VII, 383, 697.

CHAPTER XXI.

THE RIGHTS AND DUTIES OF NEUTRALS.

SECTION 1. THE INVIOIABILITY OF NEUTRAL TERRITORY.

THE TWEE GEBROEDERS.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1800.
3 C. Robinson, 162.

Sir W. SCOTT [LORD STOWELL]—This ship was taken on the 14th July 1799, on a voyage from Embden to Amsterdam, which was then under blockade; a claim has been given by the Prussian government, asserting the capture to have been made within the Prussian territory. In the course of the discussion, which this suit has produced, it has been contended that although the act of capture itself might not take place within the neutral territory, yet, that the ship to which the capturing boats belonged was actually lying within the neutral limits; and therefore, that wherever the place of capture might be, the station of the ship was in itself sufficient to affect the legality of the capture.

Upon the question so proposed, the first fact to be determined is, the character of the place where the capturing ship lay; whether she was actually stationed within those portions of land and water, or of something between water and land, which are considered to be within the limits of the Prussian territory? . . . I am of opinion, that the ship was lying within those limits, in which all direct hostile operations are by the law of nations forbidden to be exercised. That fact being assumed I have only to inquire, whether the ship being so stationed, the capture which took place, was made under such circumstances, as oblige us to consider it as an act of violence, committed within the protection of a neutral territory.

It is said that the ship was, in all respects, observant of the peace of the neutral territory; that nothing was done by her,

which could affect the right of territory, or from which any inconvenience could arise to the country, within those limits she was lying; inasmuch as the hostile force which she employed, was applied to the captured vessel lying out of the territory. But that is a doctrine that goes a great deal too far; I am of opinion, that no use, of a neutral territory, for the purposes of war, is to be permitted; I do not say remote uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates; but that, no proximate acts of war are in any manner to be allowed to originate on neutral grounds; and I cannot but think, that such an act as this, that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted: for, suppose that even a direct hostile use should be required, to bring it within the prohibition of the law of nations; nobody will say, that the very act of sending out boats to effect a capture, is not itself an act directly hostile—not complete indeed, but inchoate, and clothed with all the characters of hostility. If this could be defended, it might as well be said, that a ship lying in a neutral station might fire shot on a vessel lying out of the neutral territory; the injury in that case would not be consummated, nor received on neutral ground; but no one would say, that such an act would not be an hostile act, immediately commenced within the neutral territory: And what does it signify to the nature of the act, considered for the present purpose, whether I send out a cannon-shot which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat armed and manned to effect the very same thing at the same distance? It is in both cases the direct act of the vessel lying in neutral ground; the act of hostility actually begins, in the latter case, with the launching and manning and arming the boat, that is sent out on such an errand of force.

If it were necessary therefore to prove, that a direct and immediate act of hostility had been committed; I should be disposed to hold that it was sufficiently made out by the facts of this case.—But direct hostility appears not to be necessary; for whatever has an immediate connection with it is forbidden: you cannot, without leave, carry prisoners or booty into a neutral territory, there to be detained, because such an act is in immediate continuation of hostility. In the same manner, an act of hostility is not to take its commencement on neutral ground:

It is not sufficient to say it is not completed there—you are not to take any measure there, that shall lead to immediate violence; you are not to avail yourself of a station, on neutral territory, making as it were a vantage ground of the neutral Country, a Country which is to carry itself with perfect equality between both belligerents, giving neither the one or the other any advantage. Many instances have occurred, in which such an irregular use of a neutral Country has been warmly resented, and Some during the present war; the practice which has been tolerated in the northern states of Europe, of permitting French privateers to make stations of their ports, and to sally out to capture British vessels in that neighborhood, is of that number; and yet even that practice, unfriendly and noxious as it is, is less than that complained of in the present instance; for here the ship, without sallying out at all, is to commit the hostile act. Every government is perfectly justified in interposing to discourage the commencement of such a practice; for the inconvenience to which the neutral territory will be exposed is obvious; if the respect due to it is violated by one party, it will soon provoke a similar treatment from the other also; till, instead of neutral ground, it will soon become the theatre of war. On these grounds, I am of opinion, that this capture cannot be maintained, and I direct these vessels to be restored.

THE ELIZA ANN.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1813.

1 Dodson, 244.

These were three cases of American ships, laden with hemp, iron and other articles, and seized in Hancoe Bay, on the 11th of August, 1812, by His Majesty's ship *Vigo*, which was then lying there with other British ships of war. A claim was given, under the direction of the Swedish minister, for the ships and cargoes, "as taken within one mile of the mainland of Sweden, and within the territory of His Majesty the King of Sweden, contrary to and in violation of the law of nations, and the territory and jurisdiction of His said Majesty."

SIR W. SCOTT [LORD STOWELL].—These vessels came into

Hanco Bay for the purpose of taking the benefit of British convoy, and were seized in consequence of the order for the detention of American property. This order has been since followed up by a declaration of war; the ships, therefore, would be liable to condemnation, unless it can be shown that they are entitled to some special protection.

A claim has been given by the Swedish consul, for these ships and cargoes, as having been taken within the territories of the King of Sweden, and in violation of his territorial rights. This claim could not have been given by the Americans themselves; for it is the privilege, not of the enemy, but of the neutral country, which has a right to see that no act of violence is committed within its jurisdiction. When a violation of neutral territory takes place, that country alone, whose tranquillity has been disturbed, possesses the right of demanding reparation for the injury which she has sustained. It is a principle that has been established by a variety of decisions, both in this and in the superior Court, that the enemy, whose property has been captured, cannot himself give the claim, but must resort to the neutral for his remedy. Acts of violence by one enemy against another are forbidden within the limits of a neutral territory, unless they are sanctioned by the authority of the neutral state, which it has the power of granting to either of the belligerents, subject, of course, to a responsibility to the other. A neutral state may grant permission for such acts beforehand, or acquiesce in them after they shall have taken place, or it may, as has been done in the present instance, step forward and claim the property.

I do not observe it to be stated in the claim, that the sovereign on whose behalf it was given was a neutral at the time when the transaction took place. But, in order to give effect to a claim of this kind, it must be shewn that the party making it was then in a state of clear and indisputable neutrality. If he has shewn more favour to one side than to the other, if he has excluded the ships of one of the belligerents from his ports, and hospitably received those of the other, he cannot be considered as acting with the necessary impartiality. I do not think a country, shewing such an invidious distinction, entitled to claim in the character of a neutral state. The high privileges of a neutral are forfeited by the abandonment of that perfect indifference between the contending powers in which the essence of neutrality consists.

A claim, however, has been given by the Swedish minister. Now, in order to support and give effect to this claim, two things are necessary to be established.—First, it is requisite that Sweden should appear to have been in a state of perfect neutrality at the time when the seizure was made.—Secondly, it must be shewn that the act of violence was committed within the limits of Swedish territory. For, if the scene of hostility did not lie within the territories of the neutral state, then has there been no violation of its neutral rights. . . .

The first question then is, how far, in August, 1812, Sweden was to be considered as a neutral country. . . . [The learned judge finds that Great Britain and Sweden had been at war, and although a treaty of peace had been signed at the time of the seizure, it had not yet been ratified. Hence the court holds that the two countries were still at war.] But, in order to give validity to the present claim . . . it must be shewn that the place of capture was within the Swedish territories; and I am of opinion that it was not. Hancoe had been taken possession of by a British force, and that possession had not been disturbed. . . . There was no semblance of Swedish authority. . . . I am of opinion that the claim which has been given fails upon the two essential points . . . and consequently that these ships and cargoes are liable to condemnation.

THE ANNE.

SUPREME COURT OF THE UNITED STATES. 1818.

3 Wheaton, 435.

Appeal to the circuit court for the district of Maryland.

The British ship *Anne*, with a cargo belonging to a British subject, was captured by the [American] privateer *Uktor* while lying at anchor near the Spanish part of the island of St. Domingo, on the 13th of March, 1815, and carried into New York for adjudication. . . . Prize proceedings were duly instituted against the ship and cargo, and a claim was afterwards interposed in behalf of the Spanish consul, . . . on account of an asserted violation of the neutral territory of Spain. . . . The district court rejected the claim, and pronounced a sentence

of condemnation to the captors. Upon appeal to the circuit court, peace having taken place, the British owner . . . interposed a claim for the property, and the decree of the district court was affirmed. . . .

Mr. JUSTICE STORY delivered the opinion of the court. . . . [The learned judge finds that the capture was made in Spanish waters, but that the Spanish consul had not been authorized by his government to interpose a claim for the restitution of the vessel.]

The claim of the Spanish government for the violation of its neutral territory being thus disposed of, it is next to be considered whether the British claimant can assert any title founded upon that circumstance. By the return of peace, the claimant became rehabilitated with the capacity to sustain a suit in the courts of this country; and the argument is, that a capture made in a neutral territory is void; and, therefore, the title by capture being invalid, the British owner has a right to restitution. The difficulty of this argument rests in the incorrectness of the premises. A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him and him only, is it to be considered void. The enemy has no rights whatsoever; and if the neutral sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli*, to the captors. This is the clear result of the authorities; and the doctrine rests on well established principles of public law.

There is one other point in the case which, if all other difficulties were removed, would be decisive against the claimant. It is a fact, that the captured ship first commenced hostilities against the privateer. This is admitted on all sides; and it is no excuse to assert that it was done under a mistake of the national character of the privateer, even if this were entirely made out in the evidence. While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self-defence. The privateer had an equal title with herself to the neutral protection, and was in no default in approaching the coast without showing her national character. It was a violation of that neutrality which the captured ship was bound to observe, to commence hostilities for any purpose in these waters; for no vessel coming thither was bound to submit to

search, or to account to her for her conduct or character. When therefore, she commenced hostilities, she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign.

The conclusion from all these views of the case is, that the ship and cargo ought to be condemned as good prize of war.

Decree affirmed.

THE FLORIDA

SUPREME COURT OF THE UNITED STATES. 1879.

101 U. S. 37.

Appeal from the Supreme Court of the District of Columbia.

[On Oct. 7, 1864, the Confederate steamer Florida was captured by the American steamer Wachusett in the port of Bahia, Brazil, and brought to Hampton Roads, where in a collision she was sunk: The act of the captain of the Wachusett was disavowed by the United States. The captain having libelled the Florida as a prize of war, his libel was dismissed by the lower court, and he appealed.]

Mr. Justice SWAYNE, . . . delivered the opinion of the court.

The legal principles applicable to the facts disclosed in the record are well settled in the law of nations, and in English and American jurisprudence. Extended remarks upon the subject are, therefore, unnecessary. See Grotius, *De Jure Belli*, b. 3, c. 4, sect. 8; Bynkershoek, 61, c. 8; Burlamaqui, vol. ii. pt. 4, c. 5, sect. 19; Vattel, b. 3, c. 7, sect. 132; Dana's *Wheaton*, sect. 429 and note 208; 3 Rob. Ad. Rep. 373; 5 id. 21; *The Anne*, 3 Wheat. 435; *La Amistad de Rues*, 5 id. 385; *The Santissima Trinidad*, 7 id. 283, 496; *The Sir William Peel*, 5 Wall. 517; *The Adela*, 6 id. 266; 1 Kent, Com. (last ed.), pp. 112, 117, 121.

Grotius, speaking of enemies in war, says: "But that we may not kill or hurt them in a neutral country, proceeds not from any privileges attached to their persons, but from the right of the prince in whose dominions they are."

A capture in neutral waters is valid as between belligerents. Neither a belligerent owner nor an individual enemy owner can

be heard to complain. But the neutral sovereign whose territory has been violated may interpose and demand reparation, and is entitled to have the captured property restored.

The latter was not done in this case because the captured vessel had been sunk and lost. It was, therefore, impossible.

The libellant was not entitled to a decree in his favor, for several reasons.

The title to captured property always vests primarily in the government of the captors. The rights of individuals, where such rights exist, are the results of local law or regulations. Here, the capture was promptly disavowed by the United States. They, therefore, never had any title.

The case is one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it. *Phillips v. Payne*, 92 U. S. 130.

These things must necessarily be so, otherwise the anomaly would be possible, that, while the government was apologizing and making reparation to avoid a foreign war, the offending officer might, through the action of its courts, fill his pockets with the fruits of the offence out of which the controversy arose. When the capture was disavowed by our government, it became for all the purposes of this case as if it had not occurred.

Lastly, the maxim, "*ex turpi causa non oritur actio*," applies with full force. No court will lend its aid to a party who founds his claim for redress upon an illegal act.

The Brazilian Government was justified by the law of nations in demanding the return of the captured vessel and proper redress otherwise. It was due to its own character, and to the neutral position it had assumed between the belligerents in the war then in progress, to take prompt and vigorous measures in the case, as was done. The commander was condemned by the law of nations, public policy, and the ethics involved in his conduct.

Decree affirmed.

THE STEAMSHIP APPAM.

SUPREME COURT OF THE UNITED STATES. 1917.
243 U. S. 124.

Appeals from the District Court of the United States for the Eastern District of Virginia. . . .

[On January 15, 1916 the British passenger steamer Appam, en route from West Africa to Liverpool, was captured on the high seas by the German cruiser Moewe in latitude 33.19 N., longitude 14.24 W. The point of capture was about 1590 miles from Emden, the nearest German port; 130 miles from Puncchello in the Madeiras, the nearest available port; 1450 miles from Liverpool, and 3051 miles from Hampton Roads, Virginia. After remaining in the vicinity of the Moewe for two days, the vessel was placed under the command of a German officer who was ordered "to bring this ship into the nearest American harbor and there to lay up," a German prize crew was placed on board, dynamite bombs were distributed about the ship which the German commander was instructed to explode in case of "any trouble, mutiny or attempt to take the ship," and the crew of the Appam was compelled to navigate it to Hampton Roads where it arrived January 31, 1916. Application was at once made to the Secretary of State for the internment of both vessel and crew. This was denied, and the members of the crew were released with their personal effects. The owner and master of the vessel then filed their libels in admiralty for the purpose of obtaining possession of the vessel and cargo. The District Court having decided in their favor, 234 Fed. 389, these appeals were taken by the German officer in charge of the vessel and by the German vice-consul at Newport News, Virginia.]

MR. JUSTICE DAY delivered the opinion of the court. . . . From the facts which we have stated, we think the decisive questions resolve themselves into three: First, was the use of an American port, under the circumstances shown, a breach of this Nation's neutrality under the principles of international law? Second, was such use of an American port justified by the existing treaties between the German Government and our own? Third, was there jurisdiction and right to condemn the Appam and her cargo in a court of admiralty of the United States?

It is familiar international law that the usual course after the capture of the Appam would have been to take her into a German port, where a prize court of that Nation might have adjudicated her status, and, if it so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port, nor to the nearest port accessible of a neutral power, but was ordered to, and did, proceed over a distance of more than three thousand miles, with a view to laying up the captured ship in an American port.

It was not the purpose to bring the vessel here within the privileges universally recognized in international law, i. e., for necessary fuel or provisions, or because of stress of weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. The purpose for which the Appam was brought to Hampton Roads, and the character of the ship, are emphasized in the order which we have quoted to take her to an American port and there lay her up and in a note from His Excellency, The German Ambassador, to the Secretary of State, in which the right was claimed to keep the vessel in an American port until further notice, (Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, Department of State, European War No. 3, p. 331,) and a further communication from the German Ambassador forwarding a memorandum of a telegram from the German Government concerning the Appam (Idem, p. 333), in which it was stated:

“Appam is not an auxiliary cruiser but a prize. Therefore she must be dealt with according to Article 19 of Prusso-American treaty of 1799. Article 21 of Hague Convention concerning neutrality at sea is not applicable, as this convention was not ratified by England and is therefore not binding in present war according to Article 28. The above-mentioned Article 19 authorizes a prize ship to remain in American ports as long as she pleases. Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to English.”

➤ In view of these facts, and this attitude of the Imperial Government of Germany, it is manifest that the Appam was not brought here in any other character than as a prize, captured at sea by a cruiser of the German navy, and that the right to keep her here, as shown in the attitude of the German Government and in the answer to the libel, was rested principally upon the Prussian-American Treaty of 1799.

The principles of international law recognized by this Government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

From the beginning of its history this country has been careful to maintain a neutral position between warring governments, and not to allow the use of its ports in violation of the obligations of neutrality; nor to permit such use beyond the necessities arising from the perils of the seas or the necessities of such vessels as to sea-worthiness, provisions and supplies. Such usage has the sanction of international law, Dana's Note to Wheaton on International Law, 1866, 8th American Edition, § 391, and accords with our own practice. Moore's Digest of International Law, vol. 7, 936, 937, 938.

A policy of neutrality between warring nations has been maintained from 1793 to this time. In that year President Washington firmly denied the use of our ports to the French Minister for the fitting out of privateers to destroy English commerce. This attitude led to the enactment of the Neutrality Act of 1794, afterwards embodied in the Act of 1818, enacting a code of neutrality, which among other things inhibited the fitting out and arming of vessels; the augmenting or increasing of the force of armed vessels; or the setting on foot in our territory of military expeditions; and empowering the President to order foreign vessels of war to depart from our ports and compelling them so to do when required by the law of nations. Moore on International Arbitrations, vol. 4, 3967 *et seq.*

This policy of the American Government was emphasized in its attitude at the Hague Conference of 1907. Article 21 of the Hague Treaty provides:

"A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

Article 22 provides:

"A neutral Power must, similarly, release a prize brought

into one of its ports under circumstances other than those referred to in Article 21."

To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations. They were not ratified by the British Government. This Government refused to adhere to Article 23, which provides:

"A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

"If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.

"If the prize is not under convoy, the prize crew are left at liberty."

And in the proclamation of the convention the President recited the resolution of the Senate adhering to it, subject to the "reservation and exclusion of its Article 23 and with the understanding that the last clause of Article 3 of the said Convention implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." 36 Stat., Pt. II, p. 2438.

While this treaty may not be of binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American Government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestered pending the decision of a prize court. From the history of the conference it appears that the reason for the attitude of the American delegates in refusing to accept Article 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port. See Scott on Peace Conferences, 1899-1907, vol. II, p. 237 *et seq.*

Much stress is laid upon the failure of this Government to proclaim that its ports were not open to the reception of cap-

tured prizes, and it is argued that having failed to interdict the entrance of prizes into our ports permission to thus enter must be assumed. But whatever privilege might arise from this circumstance it would not warrant the attempted use of one of our ports as a place in which to store prizes indefinitely, and certainly not where no means of taking them out are shown except by the augmentation of her crew, which would be a clear violation of established rules of neutrality. . . .

[The learned judge then discussed the provisions of the treaty between Prussia and the United States and concluded that "such use of one of our ports was in no wise sanctioned by the Treaty of 1799."]

It remains to inquire whether there was jurisdiction and authority in an admiralty court of the United States, under these circumstances, to order restoration to an individual owner of the vessel and cargo.

The earliest authority upon this subject in the decisions of this court is found in the case of *Glass v. The Sloop Betsey*, 3 Dall. 6, decided in 1794, wherein it appeared that the commander of the French privateer, *The Citizen Genet*, captured as a prize on the high seas the sloop *Betsey* and sent the vessel into Baltimore, where the owners of the sloop and cargo filed a libel in the District Court of Maryland, claiming restitution because the vessel belonged to subjects of the King of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The District Court denied jurisdiction, the Circuit Court affirmed the decree, and an appeal was prosecuted to this court. The unanimous opinion was announced by Mr. Chief Justice Jay, holding that the District Courts of the United States possessed the powers of courts of admiralty, whether sitting as an instance or as a prize court, and sustained the jurisdiction of the District Court of Maryland, and held that that court was competent to inquire into and decide whether restitution should be made to the complainants conformably to the laws of nations and the treaties and laws of the United States.

The question came again before this court in the case of *The Santissima Trinidad*, decided in 1822, reported in 7 Wheat. 283. In that case it was held that an illegal capture would be invested with the character of a tort, and that the original owners were entitled to restitution when the property was brought within our jurisdiction. The opinion was delivered by Mr. Justice Story, and, after a full discussion of the matter, the court held that

such an illegal capture, if brought into the jurisdiction of the courts of the United States, was subject to condemnation and restitution to the owners. . . .

In the subsequent cases in this court this doctrine has not been departed from. *L'Invincible*, 1 Wheat. 238, 258; *The Estrella*, 4 Wheat. 298, 308-311; *La Amistad de Rues*, 5 Wheat. 385, 390.

It is insisted that these cases involve illegal captures at sea, or violations of neutral obligation, not arising because of the use of a port by sending in a captured vessel and keeping her there in violation of our rights as a neutral. But we are at a loss to see any difference in principle between such cases and breaches of neutrality of the character here involved in undertaking to make of an American port a depository of captured vessels with a view to keeping them there indefinitely. Nor can we consent to the insistence of counsel for appellant that the Prize Court of the German Empire has exclusive jurisdiction to determine the fate of the *Appam* as lawful prize. The vessel was in an American port and under our practice within the jurisdiction and possession of the District Court which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal under such circumstances could not oust the jurisdiction of the local court and thereby defeat its judgment. *The Santissima Trinidad*, *supra*, p. 355.

Were the rule otherwise than this court has frequently declared it to be, our ports might be filled in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligation which have controlled this country from the beginning.

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It follows that the decree in each case must be

Affirmed.

NOTE.—The law of neutrality is the most recently developed of the great divisions of international law. It was a concept unknown to

antiquity and the middle ages. In every war it was assumed that every nation would be a friend or partisan of one or the other of the belligerents. The publicists of the eighteenth century, particularly Vattel, advocated as a matter of theory something like the modern law of neutrality. But it remained for Washington, actuated chiefly by the necessities of the young American republic, to give these theories practical effect by adopting them as the policy of the government. His steadfast devotion to the principle which he had espoused and his refusal to be diverted by the clamor of Jefferson and his followers in favor of France entitle Washington to recognition as the father of the modern law of neutrality. See Foster, *A Century of American Diplomacy*, 151; Lodge, *George Washington*, II, ch. iv; Evans, *Writings of Washington*, 404. On the law of neutrality in general see Bonfils (Fauchille), sec. 1441; Kleen, *Lois et Usages de la Neutralité*; Pillet, *Les Lois Actuelles de la Guerre*, chs. xi, xii; Fenwick, *The Neutrality Laws of the United States*; Moore, *Digest*, VII, ch. xxviii; Cobbett, *Cases and Opinions*, II, Part III. For the application of the principles of neutrality in the wars of the last half-century, see Bernard, *The Neutrality of Great Britain during the American Civil War*; Benton, *International Law and Diplomacy of the Spanish-American War*; Campbell, *Neutral Rights and Obligations in the Anglo-Boer War*; Ariga, *La Guerre Russo-Japonaise*; Hershey, *International Law and Diplomacy of the Russo-Japanese War*; Takahashi, *International Law as Applied to the Russo-Japanese War*; Lawrence, *War and Neutrality in the Far East*; Phillipson, *International Law and the Great War*; Garner, *International Law and the World War*, II, ch. xxxvi; Hyde, II, 692.

The development of the law of neutrality, particularly as respects the rights of neutrals, has been much hampered by the fact that the judicial determination of questions involving such rights has been largely in the hands of prize courts, which, not unnaturally, have been strongly impressed by the necessities of the belligerents which established them. Furthermore no neutral government can overlook the fact that it may sometime cease to be a neutral, and that the protests which it makes as a neutral against the claims of belligerents may be cited against it when it in turn becomes a belligerent. And in every country the powerful influence of the army and navy is unavoidably directed to the preservation of the rights of the government as a belligerent rather than as a neutral. As a result of all these forces, the rules governing the rights of neutrals have been formulated either by the prize courts of belligerents or by neutral governments which sought to compromise between their actual status as neutrals and their potential status as belligerents. In consequence the law governing neutral rights is crude and indefinite, and it would seem possible for it to attain a satisfactory condition only by development with reference to some consistent principle.

The inviolability of neutral territory has long been recognized as a principle of law, although in practice the principle has often been violated. As early as 1528, when a French and a Flemish ship engaged in battle at the mouth of the Thames and continued to fight

up the river to London where the French boarded the enemy, they were seized by the Lieutenant of the Tower and brought before the Council, Marsden, *Select Pleas in the Court of Admiralty*, II, lxxxii, note.

In the reign of Queen Mary (1553-1558), England and Scotland being at war, a Scottish vessel attacked and captured an English vessel in a Danish harbor and sold it. The buyer took it to an English port where its original owner caused it to be arrested by a process from the Court of Admiralty. The case having come before the Lords of the Council, they asked Dr. Lewes, Judge of the Admiralty, and his fellow civilians for a report on the law. They replied (Marsden, *Law and Custom of the Sea*, I, 179):

We havinge weyd this case, with the circumstances thereof, as behoved us, thinke that hit standeth with no lawe or reason that Smythe, havinge orderly come by the possession of his owne shippe, should be dryven to restore the same to Ramsey, the Scottishman that solliciteth this cause and claymeth to have boughte the same of the first takers. For all thought he were not the first spoyler, yet his title, beyng dereyved from the same fyrste taker, is no better then theirs. And to them was the said shippe no good prise, for whate so ever the enemy dothe take from thenemye in the harborowe of a frende, that is no prise; for the proprietie therof is not altered, but remayneth still in lawe with the first owners.

In 1559, Dr. Lewes again wrote that it is unlawful "that in time of warre one enemy shall annoy the other within the territory or jurisdiction of any prince that is friendlie to both." Marsden, *Ib.* I, 180. The Scottish captures of English vessels in Danish harbors continued, and in 1562 the Judge of the Admiralty said, "The territory of an indifferent and meane prince is saufe conduct in lawe," *Ib.* I, 173. The principle was well debated before the Court of Session of Scotland in *Robert Hunter v. The Baron Count de Bothmer* (1764), Morison, *Decisions*, 11957.

If a capture is made in neutral waters, the "claim of territory" may be set up only by the neutral sovereign, *The De Fortuyn* (1760), Burrell, 175; *The Purissima Concepcion* (1805), 6 C. Robinson, 45; *The Dilgentia* (1814), 1 Dodson, 404, 412; *The Lilla* (1862), 2 Sprague, 177; *The Adela* (1867), 6 Wallace, 266; *The Bangor* (1916), L. R. [1916] P. 181. This rule is based partly on the fact that an enemy could not appear as a claimant and partly on the fact that the violation of a country's neutrality was regarded as an offense against the country where the capture was made rather than against the owner whose property was taken. If, however, the owner is a neutral or a citizen of the state of the captor, the first of these reasons disappears. Hence in *The Sir William Peel* (1867), 5 Wallace, 517, the court allowed a neutral claimant to set up the invalidity of a capture made in neutral waters, and decreed the restitution of the vessel, but refused to allow damages for its detention because of suspicious circumstances affecting the question of its neutral char-

acter. This was one of the cases submitted to the British-American Claims Commission established by the Treaty of Washington, and that Commission, not being bound by the rules of the prize courts, allowed damages on the ground that the whole transaction was invalid because the capture was made in neutral waters. See Moore, *Int. Arb.* IV, 3935. For an instance of seizure in a foreign jurisdiction because of violation of municipal neutrality laws, see *The Itata* (1892), Moore, *Int. Arb.* III, 3067.

A capture made in the territorial waters of a neutral state is valid as between the captors and the enemy owner, and may be questioned only by the neutral state, *The Adela* (1867), 6 Wallace, 266; *The Bangor* (1916), J. R. [1916] P. 181. If the infringement of neutral territory is the result of a bona fide mistake, the neutral sovereign may claim the restitution of the vessel, but not damages, *The Twee Gebroeders* (1800), 3 C. Robinson, 162; *The Vrow Anna Catherina* (1803), 5 C. Robinson, 15. If the vessel is lost through bad weather while being taken to a port of the captor, the territorial sovereign may not claim its value in money, since the principle of redress is *restitutio in integrum*, not reparation, *The Valeria* (1920), L. R. [1921] 1 A. C. 477. If the ship so captured has been requisitioned by the captor, the neutral government is not entitled to anything for its use, *The Düsseldorf* (1920), L. R. [1920] A. C. 1034. Vessels so requisitioned do not thereby become the property of the captor, since an order for requisition is not a judgment *in rem*. It confers merely a right to use, and for all purposes of prize jurisdiction such vessels are represented by their appraised value. Hence if they are lost after requisition, the sovereign making a claim of territory is entitled to their value, *The Pellworm* (1922), L. R. [1922] 1 A. C. 292.

It is well settled that a captor who takes his prize into a neutral port subjects it to the neutral jurisdiction, which may restore it to the original owner if there has been any infraction of neutrality on the part of the captor. See *L'Invincible* (1816), 1 Wheaton, 238; *The Estrella* (1819), 4 Wheat, 298; *The Gran Para* (1822), 7 Ib. 471; *The Queen v. The Chesapeake and Cargo* (Nova Scotia, 1864), 1 Oldright, 797. For other examples of the use of neutral territory by belligerents see "Neutral Port as Refuge to Escape Capture," *Int. Law St.* 1904, 79; "The Twenty-four Hour Rule," Ib. 1908, 37; "Sequestration of Prize," Ib. 53; "Asylum in Neutral Port," Ib. 1911, 9. On the use of neutral territory as an asylum see Oppenheim, II, 409-425; Moore, *Digest*, VII, 982. On the attempt of the French minister, Genet, to set up prize courts in the United States see *Glass v. The Sloop Betsey* (1794), 3 Dallas, 6.

The decision in the case of *The Appam* gave rise to much discussion. See notes in *Harvard Law Review*, XXX, 161; *Columbia Law Review*, XVII, 585; *Michigan Law Review*, XV, 487; Allin, "The Case of the Appam," *Minnesota Law Review*, I, 1; Coudert, "The Appam Case," *Am. Jour. Int. Law*, XI, 302; Dr. Arthur Burchard, "The Case of the

Appam and the Law of Nations," *Ib.* XI, 270 (a discussion from a German standpoint); Hyde, II, 734.

In discussing the duty of a captor to take his prize into a convenient port for adjudication, Lord Parker of Waddington in *The Südmark* (no. 2) [1918] A. C. 475, 480, said:

The convenience of the port to which a prize is brought in for adjudication must be determined by all the circumstances of the case. Neutral ports are not convenient ports, for it is arguable that a neutral Power could not allow a prize to remain in its ports (except temporarily, and then only by reason of special circumstances such as stress of weather or want of provisions) without committing a breach of neutrality, and, further, it might be difficult to execute the order of the Prize Court of the captors over vessels in a neutral port.

Lord Parker's concluding observation was well illustrated in the case of the *Appam*, which was condemned by the German Prize Court at Hamburg on May 11, 1916 while its release was ordered by the neutral court on July 29, 1916. The German court states that "enemy vessels are subject to capture according to P. O. [Prize Ordinance] 10 and to confiscation according to P. O. 17," and as it does not comment upon the fact that the vessel was then lying in neutral waters, it apparently attached no importance to that circumstance. The decision is printed in *Am. Jour. Int. Law*, XI, 872.

SECTION 2. THE PREVENTION OF UNNEUTRAL ACTS IN NEUTRAL TERRITORY.

THE SANTISSIMA TRINIDAD AND THE ST. ANDRE.

SUPREME COURT OF THE UNITED STATES. 1822.

7 Wheaton, 283.

Appeal from the Circuit Court of Virginia. This was a libel filed by the consul of Spain, in the district court of Virginia, in April, 1817, against eighty-nine bales of cochineal, two bales of jalap, and one box of vanilla, originally constituting part of the cargoes of the Spanish ships, *Santissima Trinidad* and *St. Andre*, and alleged to be unlawfully and piratically taken out of those vessels, on the high seas, by a squadron consisting of two armed vessels, called the *Independencia del Sud*, and the *Altravida*, and manned and commanded by persons assuming themselves to be citizens of the United Provinces of the *Rio de la Plata*. The libel was filed, in behalf of the original Spanish

owners, by Don Pablo Chaçon, consul of his Catholic Majesty for the port of Norfolk; and as amended, it insisted upon restitution, principally for three reasons: 1. That the commanders of the capturing vessels, the *Independencia* and the *Altravida*, were native citizens of the United States, and were prohibited by our treaty with Spain of 1795, from taking commissions to cruise against that power. 2. That the said capturing vessels were owned in the United States, and were originally equipped, fitted out, armed and manned in the United States, contrary to law. 3. That their force and armament had been illegally augmented within the United States. . . . [Further facts appear in the opinion.]

The district court, upon the hearing of the cause, decreed restitution to the original Spanish owners. That sentence was affirmed in the circuit court, and from the decree of the latter the cause was brought by appeal to this court.

STORY, Justice, delivered the opinion of the court.—

Upon the argument at the bar several questions have arisen, which have been deliberately considered by the court; and its judgment will now be pronounced. The first in the order in which we think it most convenient to consider the cause, is, whether the *Independencia* is, in point of fact, a public ship, belonging to the government of Buenos Ayres. The history of this vessel, so far as is necessary for the disposal of this point, is briefly this: She was originally built and equipped at Baltimore, as a privateer, during the late war with Great Britain, and was then rigged as a schooner, and called the *Mammoth*, and cruised against the enemy. After the peace, she was rigged as a brig, and sold by her original owners. In January, 1816, she was loaded with a cargo of munitions of war, by her new owners (who are inhabitants of Baltimore), and being armed with twelve guns, constituting a part of her original armament, she was despatched from that port, under the command of the claimant, on a voyage, ostensibly to the north-west coast, but in reality to Buenos Ayres. By the written instructions given to the supercargo on this voyage, he was authorized to sell the vessel to the government of Buenos Ayres, if he could obtain a suitable price. She duly arrived at Buenos Ayres, having exercised no act of hostility, but sailed under the protection of the American flag, during the voyage. At Buenos Ayres, the vessel was sold to Captain Chaytor and two other persons; and soon afterwards,

she assumed the flag and character of a public ship, and was understood by the crew to have been sold to the government of Buenos Ayres: and Captain Chaytor made known these facts to the crew, and asserted that he had become a citizen of Buenos Ayres; and had received a commission to command the vessel, as a national ship; and invited the crew to enlist in the service; and the greater part of them accordingly enlisted. From this period, which was in May 1816, the public functionaries of our own and other foreign governments at that port, considered the vessel as a public ship of war, and such was her avowed character and reputation. . . .

The next question growing out of this record, is, whether the property in controversy was captured, in violation of our neutrality, so that restitution ought, by the law of nations, to be decreed to the libellants. Two grounds are relied upon to justify restitution: First, that the *Independencia* and *Altravida* were originally equipped, armed, and manned as vessels of war, in our ports; secondly, that there was an illegal augmentation of the force of the *Independencia*, within our ports. Are these grounds, or either of them, sustained by the evidence? . . .

The question as to the original illegal armament and outfit of the *Independencia* may be dismissed in a few words. It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war, during the voyage, she would have been justly condemnable as good prize, for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure, which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a bona fide sale (and there is nothing in the evidence before us to contradict it), there is no pretence to say, that the original outfit on the voyage was illegal, or that a capture made after the sale was, for that cause alone, invalid.

The more material consideration is, as to the augmentation of her force, in the United States, at a subsequent period. . . .
[It appeared in evidence that after cruising against Spain, the

Independencia put into Baltimore for repairs. Whether she increased her armament in the course of the repairs seemed doubtful, but it was admitted that while at Baltimore she enlisted about thirty persons in her crew.] The court is, therefore, driven to the conclusion, that there was an illegal augmentation of the force of the Independencia, in our ports, by a substantial increase of her crew; and this renders it wholly unnecessary to enter into an investigation of the question, whether there was not also an illegal increase of her armament. . . .

And here we are met by an argument on behalf of the claimant, that the augmentation of the force of the Independencia, within our ports, is not an infraction of the law of nations, or a violation of our neutrality; and that so far as it stands prohibited by our municipal laws, the penalties are personal, and do not reach the case of restitution of captures made in the cruise, during which such augmentation has taken place. It has never been held by this court, that an augmentation of force or illegal outfit affected any captures made after the original cruise was terminated. By analogy to other cases of violations of public law, the offence may well be deemed to be deposited at the termination of the voyage, and not to affect future transactions. But as to captures made during the same cruise, the doctrine of this court has long established, that such illegal augmentation is a violation of the law of nations, as well as of our own municipal laws, and as a violation of our neutrality, by analogy to other cases, it infects the captures subsequently made with the character of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct. It does not lie in the mouth of wrongdoers, to set up a title derived from a violation of our neutrality. The cases in which this doctrine has been recognized and applied, have been cited at the bar, and are so numerous and so uniform, that it would be a waste of time to discuss them, or to examine the reasoning by which they are supported: more especially as no inclination exists on the part of the court to question the soundness of these decisions. If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction, could be asserted by private persons, or in any other manner than a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured, the question can never be litigated.

It can arise only upon a claim of the neutral sovereign, asserted in his own courts, or the courts of the power having cognisance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required, before cognisance of the wrong could be taken by our courts. But the practice from the beginning, in this class of causes, a period of nearly thirty years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for congress to apply at its pleasure the proper remedy. . . .

An objection . . . has been urged at the bar . . . that public ships of war are exempted from the local jurisdiction, by the universal assent of nations; and that as all property captured by such ships, is captured for the sovereign, it is, by parity of reasoning, entitled to the like exemption; for no sovereign is answerable for his acts to the tribunals of any foreign sovereign. . . . But there is nothing in the law of nations which forbids a foreign sovereign, either on account of the dignity of his station, or the nature of his prerogative, from voluntarily becoming a party to a suit, in the tribunals of another country, or from asserting there, any personal, or proprietary, or sovereign rights, which may be properly recognised and enforced by such tribunals. It is a mere matter of his own good will and pleasure; and if he happens to hold a private domain, within another territory, it may be, that he cannot obtain full redress for any injury to it, except through the instrumentality of its courts of justice. It may, therefore, be justly laid down, as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign, are amenable to the jurisdiction of himself or his courts: and that the exceptions to this rule are such only as, by common usage and public policy, have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. . . . We are of opinion, that the objection cannot be sustained; and that whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality. . . .

Upon the whole, it is the opinion of the court, that the decree of the circuit court should be affirmed, with costs.

SETON, MAITLAND & CO. v. LOW.

SUPREME COURT OF JUDICATURE OF NEW YORK. 1799.

1 Johnson, 1.

This was an action on an open policy of insurance, dated the 3d of May, 1797, upon "all kinds of lawful goods and merchandises" on board the brig Hannah, from New York to the Havana. . . . No disclosure was made to the company, at the time of obtaining the insurance, of the nature of the cargo. . . . The Hannah was captured, and carried into New Providence, where the cargo was libelled, [and part of it condemned as contraband.] The plaintiffs, on receiving intelligence of the capture and proceedings above mentioned . . . abandoned to the company, the cargo, and delivered to them the usual proofs of interest and loss. . . .

KENT, J. Two questions were raised, on the argument in this case.

1. Whether the contraband goods were lawful, within the meaning of the policy.

2. If lawful, whether the assured were bound to disclose to the defendant the fact, that part of the cargo was contraband of war.

On the first point, I am of opinion, that the contraband goods were lawful goods, and that whatever is not prohibited to be exported, by the positive law of the country, is lawful. It may be said, that the law of nations is part of the municipal law of the land, and that by that law, (and which, so far as it concerns the present question, is expressly incorporated into our treaty of commerce with Great Britain) contraband trade is prohibited to neutrals, and, consequently, unlawful. This reasoning is not destitute of force, but the fact is, that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers; and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or

abridge its trade; and yet, at the same time, from the law of necessity, as Vattel observes, the powers at war have a right to seize and confiscate the contraband goods, and this they may do from the principle of self-defence. The right of the hostile power to seize, this same very moral and correct writer continues to observe, does not destroy the right of the neutral to transport. They are rights which may, at times, reciprocally clash and injure each other. But this collision is the effect of inevitable necessity, and the neutral has no just cause to complain. A trade by a neutral in articles contraband of war, is, therefore, a lawful trade, though a trade, from necessity, subject to inconvenience and loss.

With respect to the second question, the reason of the rule requiring due disclosure of all facts, within the knowledge of either party, is to prevent fraud, and encourage good faith. . . . There are, however, certain circumstances, appertaining to every contract, which each party is presumed to know, and need not be told. . . . If an underwriter insures a private ship of war, he need not be told of secret expeditions, &c. for he is bound to know, that such are the presumed destinations of such vessels. All matters of general notoriety and speculation, every party is bound to know, at his own peril. . . . The underwriter is presumed to know that the neutral trade undergoes no abridgement, or abandonment, in war; that it is likely to consist of the same kind of articles in war as in peace, and, consequently, that the nature of the cargo need not be disclosed. . . .

My opinion, accordingly is, that judgment be rendered for the plaintiffs as for a total loss. . . .

[LANSING, C. J., and LEWIS, J., delivered concurring opinions. BENSON, J., dissented.]

KENNETT ET AL. v. CHAMBERS.

SUPREME COURT OF THE UNITED STATES. 1852.
14 Howard, 38.

This was an appeal from the District Court of the United States for the District of Texas. . . .

[This was a bill for the specific performance of a contract

which the appellants or their predecessors in title had made at Cincinnati, Ohio, in 1836, with General T. Jefferson Chambers of the Texas army, the motive of which contract was set forth in the following words: "That the party of the second part, being desirous of assisting the said General T. Jefferson Chambers, who is now engaged in raising, arming and equipping volunteers for Texas, and who is in want of means therefor; and being extremely desirous to advance the cause of freedom and the independence of Texas, have agreed to purchase of the said T. Jefferson Chambers, of his private estate, the lands hereinafter described." The bill averred that although the money promised had been paid, Chambers had refused to convey the land. The District Court decided that the contract was illegal and void and dismissed the bill.]

MR. CHIEF JUSTICE TANEY delivered the opinion of the court. . . .

The validity of this contract depends upon the relation in which this country then stood to Mexico and Texas; and the duties which these relations imposed upon the government and citizens of the United States.

Texas had declared itself independent a few months previous to this agreement. But it had not been acknowledged by the United States; and the constituted authorities charged with our foreign relations regarded the treaties we had made with Mexico as still in full force, and obligatory upon both nations. By the treaty of limits, Texas had been admitted by our government to be a part of the Mexican territory; and by the first article of the treaty of amity, commerce, and navigation, it was declared, "that there should be a firm, inviolable, and universal peace, and a true and sincere friendship between the United States of America and the United Mexican States, in all the extent of their possessions and territories, and between their people and citizens respectively, without distinction of persons or place." These treaties, while they remained in force, were, by the Constitution of the United States, the supreme law, and binding not only upon the government, but upon every citizen. No contract could lawfully be made in violation of their provisions.

Undoubtedly, when Texas had achieved her independence, no previous treaty could bind this country to regard it as a part of the Mexican territory. But it belonged to the government, and not to individual citizens, to decide when that event had

taken place. And that decision, according to the laws of nations, depended upon the question whether she had or had not a civil government in successful operation, capable of performing the duties and fulfilling the obligations of an independent power. It depended upon the state of the fact, and not upon the right which was in contest between the parties. And the President, in his message to the Senate of Dec. 22, 1836, in relation to the conflict between Mexico and Texas, which was still pending, says: "All questions relative to the government of foreign nations, whether of the old or the new world, have been treated by the United States as questions of fact only, and our predecessors have cautiously abstained from deciding upon them until the clearest evidence was in their possession, to enable them not only to decide correctly, but to shield their decision from every unworthy imputation." Senate Journal of 1836, 37, p. 54.

Acting upon these principles, the independence of Texas was not acknowledged by the government of the United States until the beginning of March, 1837. Up to that time, it was regarded as a part of the territory of Mexico. The treaty which admitted it to be so, was held to be still in force and binding on both parties, and every effort made by the government to fulfil its neutral obligations, and prevent our citizens from taking part in the conflict. This is evident, from an official communication from the President to the Governor of Tennessee, in reply to an inquiry in relation to a requisition for militia, made by General Gaines. The despatch is dated in August, 1836; and the President uses the following language: "The obligations of our treaty with Mexico, as well as the general principles which govern our intercourse with foreign powers, require us to maintain a strict neutrality in the contest which now agitates a part of that republic. So long as Mexico fulfils her duties to us, as they are defined by the treaty, and violates none of the rights which are secured by it to our citizens, any act on the part of the Government of the United States, which would tend to foster a spirit of resistance to her government and laws, whatever may be their character or form, when administered within her own limits and jurisdiction, would be unauthorized and highly improper." Ex. Doc. 1836, 1837, Vol. 1, Doc. 2, p. 58.

And on the very day on which the agreement of which we are speaking was made, (Sept. 16, 1836), Mr. Forsyth, the Secretary of State, in a note to the Mexican Minister, assured him

that the government had taken measures to secure the execution of the laws for preserving the neutrality of the United States, and that the public officers were vigilant in the discharge of that duty. Ex. Doc. Vol. 1, Doc. 2, pp. 63-64.

And still later, the President, in his message to the Senate of Dec. 22, 1836, before referred to, says: "The acknowledgment of a new State as independent, and entitled to a place in the family of nations, is at all times an act of great delicacy and responsibility; but more especially so when such a State has forcibly separated itself from another, of which it formed an integral part, and which still claims dominion over it." And, after speaking of the policy which our government had always adopted on such occasions, and the duty of maintaining the established character of the United States for fair and impartial dealing, he proceeds to express his opinion against the acknowledgment of the independence of Texas, at that time, in the following words:—

"It is true, with regard to Texas, the civil authority of Mexico has been expelled, its invading army defeated, the chief of the republic himself captured, and all present power to control the newly organized Government of Texas annihilated within its confines. But, on the other hand, there is, in appearance at least, an immense disparity of physical force on the side of Mexico. The Mexican republic, under another executive, is rallying its forces under a new leader, and menacing a fresh invasion to recover its lost dominion. Upon the issue of this threatened invasion, the independence of Texas may be considered as suspended; and, were there nothing peculiar in the relative situation of the United States and Texas, our acknowledgment of its independence at such a crisis would scarcely be regarded as consistent with that prudent reserve with which we have heretofore held ourselves bound to treat all similar questions."

The whole object of this message appears to have been to impress upon Congress the impropriety of acknowledging the independence of Texas at that time; and the more especially as the American character of her population, and her known desire to become a State of this Union, might, if prematurely acknowledged, bring suspicion upon the motives by which we were governed.

We have given these extracts from the public documents not only to show that, in the judgment of our government, Texas

had not established its independence when this contract was made, but to show also how anxiously the constituted authorities were endeavoring to maintain untarnished the honor of the country, and to place it above the suspicion of taking any part in the conflict.

This being the attitude in which the government stood, and this its open and avowed policy, upon what grounds can the parties to such a contract as this, come into a court of justice of the United States and ask for its specific execution? It was made in direct opposition to the policy of the government, to which it was the duty of every citizen to conform. And, while they saw it exerting all its power to fulfil in good faith its neutral obligations, they made themselves parties to the war, by furnishing means to a general of the Texan army, for the avowed purpose of aiding and assisting him in his military operations.

It might indeed fairly be inferred, from the language of the contract and the statements in the appellants' bill, that the volunteers were to be raised, armed, and equipped within the limits of the United States. The language of the contract is: "That the said party of the second part (that is the complainants), being desirous of assisting the said General T. Jefferson Chambers, who is now engaged in raising, arming and equipping volunteers for Texas, and is in want of means therefor." And as General Chambers was then in the United States, and was, as the contract states, actually engaged at that time in raising, arming, and equipping volunteers, and was in want of means to accomplish his object, the inference would seem to be almost irresistible that these preparations were making at or near the place where the agreement was made, and that the money was advanced to enable him to raise and equip a military force in the United States. And this inference is the stronger, because no place is mentioned where these preparations are to be made, and the agreement contains no engagement on his part, or proviso on theirs, which prohibited him from using these means and making these military preparations within the limits of the United States.

If this be the correct interpretation of the agreement, the contract is not only void, but the parties who advanced the money were liable to be punished in a criminal prosecution, for a violation of the neutrality laws of the United States. And certainly, with such strong indications of a criminal intent, and

without any averment in the bill from which their innocence can be inferred, a court of chancery would never lend its aid to carry the agreement into specific execution, but would leave the parties to seek their remedy at law. And this ground would of itself be sufficient to justify the decree of the District Court dismissing the bill.

But the decision stands on broader and firmer ground, and this agreement cannot be sustained either at law or in equity. The question is not whether the parties to this contract violated the neutrality laws of the United States or subjected themselves to a criminal prosecution; but whether such a contract, made at that time, within the United States, for the purposes stated in the contract and the bill of complaint, was a legal and valid contract, and such as to entitle either party to the aid of the courts of justice of the United States to enforce its execution.

The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without a breach

of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And if he does so he cannot claim the aid of a court of justice to enforce it. The appellants say, in their contract, that they were induced to advance the money by the desire to promote the cause of freedom. But our own freedom cannot be preserved without obedience to our laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limits of its constitutional power.

But it has been urged in the argument that Texas was in fact independent, and a sovereign state at the time of this agreement; and that the citizen of a neutral nation may lawfully lend money to one that is engaged in war, to enable it to carry on hostilities against its enemy.

It is not necessary, in the case before us, to decide how far the judicial tribunals of the United States would enforce a contract like this, when two states, acknowledged to be independent, were at war, and this country neutral. It is a sufficient answer to the argument to say that the question whether Texas had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexican territory. And if we undertook to inquire whether she had not in fact become an independent sovereign state before she was recognized as such by the treaty-making power, we should take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit, and which the Constitution has conferred exclusively upon another department.

This is not a new question. It came before the court in the case of *Rose v. Himely*, 4 Cr. 272, and again in *Gelston v. Hoyt*, 3 Wheat. 324. And in both of these cases the court said, that it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world; and until such recognition, either by our own government or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered.

It was upon this ground that the Court of Common Pleas in England, in the case of *De Wutz v. Hendricks*, 9 Moo. 586, decided that it was contrary to the law of nations for persons residing in England to enter into engagements to raise money by way of loan for the purpose of supporting subjects of a foreign state in arms against a government in friendship with England, and that no right of action attached upon any such contract. And this decision is quoted with approbation by Chancellor Kent, in 1 Kent, Com. 116.

Nor can the subsequent acknowledgment of the independence of Texas, and her admission into the Union as a sovereign State, affect the question. The agreement being illegal and absolutely void at the time it was made, it can derive no force or validity from events which afterwards happened.

But it is insisted, on the part of the appellants, that this contract was to be executed in Texas, and was valid by the laws of Texas, and that the District Court for that State, in a controversy between individuals, was bound to administer the laws of the State, and ought therefore to have enforced this agreement.

This argument is founded in part on a mistake of the fact. The contract was not only made in Cincinnati, but all the stipulations on the part of the appellants were to be performed there and not in Texas. And the advance of money which they agreed to make for military purposes was in fact made and intended to be made in Cincinnati, by the delivery of their promissory notes, which were accepted by the appellee as payment of the money. This appears on the face of the contract. And it is this advance of money for the purposes mentioned in the agreement, in contravention of the neutral obligations and policy of the United States, that avoids the contract. The mere agreement to accept a conveyance of land lying in Texas, for a valuable consideration paid by them, would have been free from objection.

But had the fact been otherwise, certainly no law of Texas then or now in force could absolve a citizen of the United States, while he continued such, from his duty to this government, nor compel a court of the United States to support a contract, no matter where made or where to be executed, if that contract was in violation of their laws, or contravened the public policy of the government, or was in conflict with subsisting treaties with a foreign nation.

We therefore hold this contract to be illegal and void, and affirm the decree of the District Court.

MR. JUSTICE DANIEL and MR. JUSTICE GRIER dissented.

THE HELEN.

HIGH COURT OF ADMIRALTY OF ENGLAND. 1865.
Law Reports, 1 Ad. and Ecc. 1.

In this case, the master sued for wages upon an agreement entered into between himself and the defendants, the owners of the *Helen*.

The defendants, in the fourth article of their answer, alleged that "the agreement was made and entered into for the purpose of running the blockade of the Southern ports of the United States of America, or one of them, and was and is contrary to law, and cannot be recognized or enforced by this Honourable Court." . . .

DR. LUSHINGTON. This is a motion by the plaintiff to reject the fourth article of the defendants' answer. The parties in this cause are John Andrews Wardell, formerly the master of the *Helen*, plaintiff, and the Albion Trading Company, the owners of the ship, defendants. The master sues for wages (with certain premiums added) alleged to have been earned between July, 1864, and March, 1865. The answer states that according to the agreement as set forth by the defendants, the plaintiff has been paid all that was due to him. This part of the answer is not objected to. The fourth and last article is the one objected to—It alleges that the agreement was entered into for the purpose of breaking the blockade of the Southern States of America; that such an agreement is contrary to law, and cannot be enforced by this Court. In the course of the argument, the judgment in *Ex parte Chavasse re Grazebrook*, 34 L. J. (Bkr.), 17, was cited as governing the case; a judgment recently delivered by Lord Westbury whilst he was Lord Chancellor. The law there laid down is briefly stated, that a contract of partnership in blockade-running is not contrary to the municipal law of this country; and by the decree the partnership was declared valid, and the accounts ordered accordingly. It was

admitted that this decision is directly applicable to the present case, a suit to recover wages according to a contract with respect to an intended adventure to break the blockade.

That a decision of the Lord Chancellor is to be treated by this Court with the greatest respect there can be no doubt, but is it absolutely binding? There are three tribunals whose decisions are absolutely binding upon the Court of Admiralty: 1. The House of Lords. 2. The Privy Council. 3. The Courts of Common Law when deciding upon the construction of a statute. If a decision of any of these tribunals is cited, all that the Court of Admiralty can do is to inquire if the decision is applicable to the case. If so, then it is the duty of the Court to obey, whatever may be its own judgment.

No other decisions are, I believe, absolutely binding on the Court. On the present occasion, no decision has been cited from the House of Lords or Privy Council. Whatever, therefore, may be the effect of the decisions of other tribunals, I am not relieved from the duty of reconsidering the whole question.

An intimation has been given that this case will be carried to the Judicial Committee [of the Privy Council]; if so, I apprehend that tribunal might be inclined to consider me remiss in my duty if I had omitted to form an independent judgment on the case, and to state it with my reasons. It is, I conceive, admitted on all hands, that the Court must enforce the agreement with the master, unless it is satisfied that such agreement is illegal by the municipal law of Great Britain. In order to prove this proposition, the defendants say that the agreement to break the blockade by a neutral ship is, on the part of all persons concerned, illegal according to the law of nations, and that the law of nations is a part of the municipal law of the land—*ergo*, this contract was illegal by municipal law.

Now a good deal may depend on the sense in which the word "illegal" is used. I am strongly inclined to think that the defendants attach to it a more extensive meaning than it can properly bear, or was intended to bear by those who used it. The true meaning, I think, is that all such contracts are illegal so far, that if carried out they would lead to acts which might, under certain circumstances, expose the parties concerned to such penal consequences as are sanctioned by international law, for breach of blockade, or for the carrying of contraband. If so, the illegality is of a limited character. For instance, suppose a vessel after breaking the blockade completes her voyage home,

and is afterwards seized on another voyage, the original taint of illegality—whatever it may have been—is purged, and the ship cannot be condemned; yet if the voyage was, *ab initio*, wholly and absolutely illegal, both by the law of nations and the municipal law, why should its successful termination purge the offence? Let me consider the relative situation of the parties. A neutral country has a right to trade with all other countries in time of peace. One of these countries becomes a belligerent, and is blockaded. Why should the right of the neutral be affected by the acts of the other belligerent? The answer of the blockading power is: "Mine is a just and necessary war," a matter which, in ordinary cases, the neutral cannot question, "I must seize contraband, I must enforce blockade, to carry on the war." In this state of things there has been a long and admitted usage on the part of all civilized states—a concession by both parties, the belligerent and the neutral—a universal usage which constitutes the law of nations. It is only with reference to this usage that the belligerent can interfere with the neutral. Suppose no question of blockade or contraband, no belligerent could claim a right of seizure on the high seas of a neutral vessel going to the port of another belligerent, however essential to his interest it might be so to do.

What is the usage as to blockade? There are several conditions to be observed in order to justify the seizure of a ship for breach of blockade. The blockade must be effectual and (save accidental interruption by weather) constantly enforced. The neutral vessel must be taken *in delicto*. The blockade must be enforced against all nations alike, including the belligerent one. When all the necessary conditions are satisfied, then, by the usage of nations, the belligerent is allowed to capture and condemn neutral vessels without remonstrance from the neutral state. It never has been a part of admitted common usage that such voyages should be deemed illegal by the neutral state, still less that the neutral state should be bound to prevent them; the belligerent has not a shadow of right to require more than universal usage has given him, and has no pretence to say to the neutral: "You shall help me to enforce my belligerent right by curtailing your own freedom of commerce, and making that illegal by your own law which was not so before." This doctrine is not inconsistent with the maxim that the law of nations is part of the law of the land. That fact is, the law of nations has never declared that a neutral state is bound to impede or

diminish its own trade by municipal restriction. Our own Foreign Enlistment Act is itself a proof that to constitute transactions between British subjects, when neutral and belligerents, a municipal offence by the law of Great Britain, a statute was necessary. If the acts mentioned in that statute were in themselves a violation of municipal law, why any statute at all? I am now speaking of fitting out ships of war, not of levying soldiers, which is altogether a different matter. Then how stands the case upon authority? I may here say, that in principle, there is no essential difference whether the question of breach of municipal law is raised with regard to contraband or breach of blockade.

Mr. Duer is the only text-writer who maintains an opinion contrary to what I have stated to be the law. He maintains it with much ability and acuteness, but he stands alone. He himself admits that an insurance of a contraband voyage is no offence against municipal law of a neutral country, according to the practice of all the principal states of continental Europe. (Duer, *Marine Insurance*, I. lecture vii). In the American courts the question has been more than once agitated, but with the same result. In the case of *The Santissima Trinidad*, 7 Wheaton 340, Mr. Justice Story says:—"It is apparent that, though equipped as a vessel of war, she (the *Independencia*) was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize, and for being engaged in a traffic prohibited by the law of nations. But there is nothing in our law or in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." "There is no pretence for saying that the original outfit on the voyage was illegal." Again, in *Richardson v. The Marine Insurance Company*, 6 Mass., 112, Parsons, C. J., observes:—"The last class we shall mention is the transportation by a neutral of goods contraband of war to the country of either of the belligerent powers. And here, it is said, that these voyages are prohibited by the law of nations, which forms a part of the municipal law of every state, and, consequently, that an insurance on such voyages made in a neutral state is pro-

hibited by the laws of that state, and therefore, as in the case of an insurance on interdicted commerce, is void. That there are certain laws which form a part of the municipal laws of all civilized states, regulating their mutual intercourse and duties, and thence called the law of nations, must be admitted: as, for instance, the law of nations affecting the rights and the security of ambassadors. But we do not consider the law of nations, ascertaining what voyages or merchandise are contraband of war, as having the same extent and effect. It is agreed by every civilized state that, if the subject of a neutral power shall attempt to furnish either of the belligerent sovereigns with goods contraband of war, the other may rightfully seize and condemn them as prize. But we do not know of any rule established by the law of nations that the neutral shipper of goods contraband of war, is an offender against his own sovereign, and liable to be punished by the municipal laws of his own country. When a neutral sovereign is notified of a declaration of war, he may, and usually does, notify his subjects of it, with orders to decline all contraband trade with the nations at war, declaring that, if they are taken in it, he cannot protect them, but not announcing the trade as a violation of his own laws. Should their sovereign offer to protect them, his conduct would be incompatible with his neutrality. And as, on the one hand, he cannot complain of the confiscation of his subjects' goods, so, on the other, the power at war does not impute to him these practices of his subjects. A neutral merchant is not obliged to regard the state of war between other nations, but if he ships goods prohibited *jure belli*, they may be rightfully seized and condemned. It is one of the cases where two conflicting rights exist, which either party may exercise without charging the other with doing wrong. As the transportation is not prohibited by the laws of the neutral sovereign, his subjects may lawfully be concerned in it; and, as the right of war lawfully authorizes a belligerent power to seize and condemn the goods, he may lawfully do it." Lastly, in *Seton, Maitland & Co. v. Low*, 1 Johnson, 5, Mr. Justice Kent says:—"I am of opinion that the contraband goods were lawful goods, and that whatever is not prohibited to be exported by the positive law of the country is lawful. It may be said that the law of nations is part of the municipal law of the land, and that by that law contraband trade is prohibited to neutrals, and, consequently, unlawful. This reasoning is not destitute of force; but the fact is that the law of nations does

not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers."

In the English Courts the only case in which the point has been actually decided is the recent case before the Lord Chancellor, which I have already adverted to. With regard to the cases in Mr. Duer's book, *Naylor v. Taylor*, 9 B. & C. 718, *Medeiros v. Hill*, 8 Bing. 231, it is enough to say that, in the view which the court eventually took of the facts, the question of law did not arise. It is in these two cases impossible to say with certainty what was the opinion of the judges at *nisi prius*.

I cannot entertain any doubt as to the judgment I ought to pronounce in this case. It appears that principle, authority, and usage unite in calling on me to reject the new doctrine that, to carry on trade with a blockaded port, is or ought to be a municipal offence by the law of nations. I must direct the 4th article of the answer to be struck out. I cannot pass by the fact that the attempt to introduce this novel doctrine comes from an avowed *particeps criminis*, who seeks to benefit himself by it. As he has failed on every ground, he must pay the cost of his experiment.

PEARSON ET AL. v. PARSON ET AL.

UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.
1901.

108 Fed. 461.

In Equity. On motion for preliminary injunction.

The complainants are Samuel Pearson, a citizen of the South African Republic, Edward Van Ness, a citizen of the state of New York, and Charles D. Pierce, consul general of the Orange Free State, whose citizenship is not set forth. In their original bill herein they aver, in substance: That the United States are at peace with the South African Republic and the Orange Free State, and that Great Britain is at war with the same. That complainants are owners of property situated in the South African Republic and the Orange Free State. That Great Britain, by means of armies, seeks to destroy, and is now destroying, the property of complainants. That, for the purpose of carrying

on the war, the steamship Anglo-Australian, of which J. Parson is master, now lies in the port of New Orleans, and is being loaded with 1,200 mules, worth \$150,000, by Parson, and by Elder, Dempster & Co., who are the agents for the ship, her owners and charterers, and who are represented by Robert Warriner and Mathew Warriner. All of the defendants are averred to be British subjects. That the steamship Anglo-Australian is employed in the war in the military service of Great Britain by her owners and charterers and by the defendants. That for some time past the defendants, in aid of the war, have loaded ships at New Orleans with munitions of war, viz. mules and horses, and have equipped ships with fittings for the purpose of carrying military supplies and munitions of war for Great Britain, and have dispatched the ships, well knowing that the munitions of war and the ships are in the military service of Great Britain, and would be employed in the war. That the steamship Anglo-Australian is about to be dispatched by the defendants, loaded with mules and horses, being munitions of war, which are the property of the government of Great Britain, and the same are to be employed in the military service of Great Britain. That the defendants are making the port of New Orleans the basis of military operations in aid of Great Britain in the war, and are using the port for the purpose of renewal and augmentation of the military supplies and arms of Great Britain in the war. That the defendants have caused and are causing complainants irreparable injury, in that their acts enable Great Britain to carry on the war with the South African Republic and Orange Free State, wherein are found that property of complainants, and that the army of Great Britain is enabled, by the means furnished by the defendants, to lay waste and destroy the farms and homes of complainants, and to hold as prisoners of war the wife and children of the complainant Pearson. That the complainant Pearson has already suffered loss of property to the amount of \$90,000., and is now threatened with further loss of \$100,000., by the acts complained of and the continuation of the war. That the war is only carried on by the renewal and augmentation of the military supplies of Great Britain from the ports of the United States and especially the port of New Orleans, and that when this ceases the war will end. That the defendants have conspired with certain agents and servants of Great Britain, whose names are unknown, to aid in the carrying on of the war, in the renewal and augmentation of the supplies

of Great Britain, and in the equipping with munitions of war and the dispatching of the ship Anglo-Australian and other vessels for the purpose of slaying the citizens of the South African Republic and the Orange Free State, and destroying their property, and more particularly to injure and destroy the property and rights of complainants, all in violation of and against the rights, privileges, and immunities granted and secured to complainants by the law of nations and the constitution and laws of the United States. The prayer of the original bill is, in substance, for an injunction prohibiting the defendants, their agents, servants, etc., from loading on the ship Anglo-Australian, or other vessels, munitions of war, viz. mules and horses destined for use by Great Britain in the war. A restraining order or temporary injunction in advance of a final injunction is also prayed for. . . .

PARLANGE, District Judge (after stating the facts). It was conceded on the argument that the court has no jurisdiction of this cause *ratione personarum*. The complainants sought to maintain the jurisdiction *ratione materiae* by a claim of right under the treaty of Washington of May 8, 1871, between Great Britain and the United States relative to the "Alabama claims," in which treaty it is declared that:

"A neutral government is bound . . . not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men."

The complainants contend that, by reason of this declaration of the treaty, they are entitled to invoke the equity powers of this court for the protection of their property. If the complainants could be heard to assert here rights personal to themselves in the treaty just mentioned, and if the mules and horses involved in this cause are munitions of war, all of which is disputed by the defendants, it would become necessary to determine whether the United States intended by the above declaration of the treaty to subvert the well-established principle of international law that the private citizens of a neutral nation can lawfully sell supplies to belligerents. It is almost impossible to suppose, *a priori*, that the United States would have done so, and would have thus provided for the most serious and extensive derangement of and injury to the commerce of our

citizens whenever two or more foreign nations should go to war; and it would seem that there is nothing in the treaty, especially when its history and purposes are considered, which would warrant the belief that the United States insisted upon inserting therein a new principle of international law, from which the greatest damage might result to the commerce of this country, and which was absolutely different from and antagonistic to the rule and policy which the government of this country had theretofore strenuously and invariably followed. The principle that neutral citizens may lawfully sell to belligerents has long since been settled in this country by the highest judicial authority. In the case of *The Sanctissima Trinidad*, 7 Wheat. 340, 5 L. Ed. 454, Mr. Justice Story, as the organ of the Supreme Court, said:

"There is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation."

See, also, the case of *The Bermuda*, 3 Wall. 551, 18 L. Ed. 200.

16 Am. & Eng. Enc. Law (2d Ed.) p. 1161, *verbis* "International Law," citing cases in support of the text, says:

"A neutral nation is, in general, bound not to furnish munitions of war to a belligerent, but there is no obligation upon it to prevent its subjects from doing so; and neutral subjects may freely sell at home to a belligerent purchaser, or carry to a belligerent power, arms and munitions of war, subject only to the possibility of their seizure as contraband while in transit."

Numerous other authorities on this point could be cited, if it was not deemed entirely unnecessary to do so.

The principle has been adhered to by the executive department of the government from the time when Mr. Jefferson was Secretary of State to the present day. Mr. Jefferson said in 1793:

"Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings—the only means, perhaps, of their subsistence—because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of

those at peace, does not require from them such an internal derangement in their occupation."

To the same effect are numerous other expressions and declarations of the executive department of the government from the earliest period of the country to the present time. See 3 Whart. Int. Law Dig. par. 391, tit. "Munitions of War."

Affidavits in the cause purport to show that the vessels which make the exportations of mules and horses of which the bills complain are private merchant vessels; that they are commanded by their usual officers, appointed and paid by the owners; that they are manned by their usual private crews, which are also paid by the owners; that they are not equipped for war; that they are not in the military service of Great Britain, nor controlled by the naval authorities of that nation; that they carry the mules and horses as they would carry any other cargo; and that the mules and horses are to be landed, not on the territory of the South African Republic or the Orange Free State, but in Cape Colony, which is territory belonging to Great Britain. If these affidavits set out the facts truly, it is difficult to see how a cause of complaint can arise. If a belligerent may come to this country and buy munitions of war, it seems clear that he may export them as freight in private merchant vessels of his own or any other nationality, as cargo could be exported by the general public.

Another consideration in this cause is whether the allegations of threatened injury to the property rights of the complainants would in any case warrant the interposition of a court of equity. The theory of the complainants is that, if the injunction issues in this cause, the war will cease, but that, if these horses and mules are allowed to go to South Africa, the war will be carried on, and one of the results of its further prosecution will be the destruction of the complainants' property in South Africa. It is not claimed, of course, that the horses and mules are to be used specially to destroy the property of the complainants. In such cases as the present one, where the aid of equity is invoked to protect property rights, the injury apprehended must be a clear and reasonable one, proximately resulting from the act sought to be enjoined. The injury apprehended by the complainants from the shipping of the mules and horses seems to be remote, indistinct, and entirely speculative. It seems clear that, even if this cause were within the cognizance of this court, there is herein no such connection of cause and effect between

the shipment of the animals and the destruction of complainants' property as could sustain an averment of threatened irreparable injury, and that the averment that the war would cease if the shipments are stopped, which, in the nature of things, can only be an expression of opinion and hope concerning a matter hardly susceptible of proof, could not be made the basis for judicial action.

It may be well to notice that there is nothing in this cause upon which could be founded a charge that the neutrality statutes of the United States are being violated. A citation of authorities on this point is deemed unnecessary. While I apprehend fully that the complainants are not claiming through or because of the neutrality statutes, still it would seem that there exists at least a presumption that the United States have been careful to provide in those statutes for the punishment of every breach of neutrality recognized by this country.

But the nature of this cause is such that none of the considerations hereinabove set out need be decided, for the reason that a view of this case presents itself which is paramount to all its other aspects, and leads irresistibly to the conclusion that the rule *nisi* must be denied. That view is that the case is a political one, of which a court of equity can take no cognizance, and which, in the very nature of governmental things, must belong to the executive branch of the government. No precedent or authority has been cited to the court which, in its opinion, could even remotely sustain the cause of the complainants. No case has been cited, nor do I believe that any could have been cited, presenting issues similar to those of this cause. The three complainants are private citizens. It is true that the complainant Pierce avers that he is consul general of the Orange Free State; but his demand is exclusively a personal one, and he must be deemed to be suing in his personal capacity. One of the complainants is an alien and a citizen of the Orange Free State. Only one of the complainants is alleged to be a citizen of the United States. They own property in the South African Republic and the Orange Free State, foreign countries now at war with Great Britain. They fear that the war, if continued, will result in the destruction of their property. They believe that, if the shipment of mules and horses from this port are stopped, the war will cease. They claim that, by virtue of a declaration of international law contained in an international treaty to which the foreign countries in which their property is

situated were not parties, they have the personal right to enjoin the shipments for the purpose of stopping the war, and thus saving their property from the destruction which they apprehend will result to it from a continuation of the war. When complainants' cause is thus analyzed, and the nature of the alleged right under the treaty is considered, it is obvious that a court of equity cannot take cognizance of the cause. The main case relied on by the counsel for the complainants is the case of *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217 (English Chancery Reports), in which the emperor of Austria sought and obtained an injunction to restrain the manufacture in England of a large quantity of notes purporting to be receivable as money in, and to be guaranteed by, Hungary. That action was brought by the emperor of Austria as the sovereign and representative of his nation, and the case turned and was decided on considerations entirely different from, and in no manner resembling, those presented in this cause. It may be worth noticing that the counsel for the emperor of Austria freely conceded in the argument of the case that the exportation of munitions of war could not be enjoined. I am clearly of opinion that this cause is not within the cognizance of this court, and for that reason the rule nisi must be denied.

BOARMAN, District Judge, who sat in this cause with PARLANGE, District Judge, concurs in the opinion.

THE LUCY H.

THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA. 1916.

235 Fed. 610.

In Admiralty. Libel of information and seizure maritime by the United States against the American schooner *Lucy H.* for violation of neutrality laws. On exceptions to libel. . . .

On September 14, 1915, the American schooner *Lucy H.*, then in the port of Pensacola, Fla., in command of one H. B. Snell, master, took on board, besides a crew of 9 men and 15 Mexicans, a cargo of 162 rifles and 25,000 rounds of ammunition. Whereupon the vessel proceeded to Key West, Fla., arriving there about the last of the month. Here two more cases of rifles and

a quantity of stores were added to the cargo. On the night of Tuesday, October 19, 1915, the vessel sailed from Key West in an unauthorized manner, and proceeded toward Tuxpam on the east coast of Mexico. The Mexicans taken on board at Pensacola remained with the vessel throughout the voyage. They were not shipped as crew nor listed as passengers. Near Tuxpam the Lucy H. discharged 2 of her crew, who went ashore with 2 of the Mexicans in one of the ship's boats and did not return. The schooner then beat up and down the Mexican coast two or three days, during which time, while off a settlement, another Mexican was sent ashore. Finally the Lucy H. dropped anchor, and the remainder of the Mexicans and all of the cargo were sent ashore, after which the schooner sailed for Pensacola, arriving on November 11, 1915, where she was seized upon a libel of information which charged substantially in alternative articles, under section 11 of the Penal Code, that: "The said schooner Lucy H., on the 14th day of September A. D. 1915, within the navigable waters of the United States and within the jurisdiction of this court, was then and there unlawfully furnished, fitted out and supplied . . . and armed with a military expedition of 15 armed men, more or less, with intent to be employed in the service of the Villaistas, certain insurgents in the country called Mexico, with whom the United States were and are at peace, with intent to cruise and commit hostilities against the subjects, citizens and property of . . ."—First, the people of Mexico; second, Gen. Carranza, a foreign prince; third, the colony of Mexico; fourth, the district of Mexico; fifth, the republic of Mexico; sixth, the *de facto* government and the forces of Gen. Carranza; with whom the United States then were and now are at peace, etc. . . .

SHEPPARD, District Judge. . . . The American schooner Lucy H. was seized by the United States on a libel of information with 36 articles, charging a violation of the Neutrality Act as finally amended April 20, 1818 and embodied in section 11 of the Penal Code of 1910 (Comp. St. 1913, § 10175), the pertinent provisions of which read:

"Whoever, within the territory . . . of the United States fits out and arms . . . any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom

the United States are at peace . . . and every such vessel, . . . her tackle . . . materials . . . stores . . . shall be forfeited."

The sufficiency of the libel in law is challenged by several exceptions, the sixth and seventh of which test the substance of the case as made by the libel, and submits for judicial determination the concrete question whether the acts charged in the libel as *delictum* come within the inhibition of the statute. These exceptions maintain substantially that to violate the statute the vessel must be fitted out "with intent . . . [to] be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace," and who are at the time enjoying independent political recognition.

First. It is contended that the whole import of the libel is that the vessel was to be employed in the service of named bandits, whom it is impossible to bring within the first prohibitive classes described in the Neutrality Act, viz., "any foreign prince or state, or of any colony, district or people."

Second. It is contended by the claimant that, according to the articles of the libel, the vessel was not fitted out to cruise against the "subjects, citizens or property of any foreign prince or state, or of any colony, district or people with whom the United States are at peace," but against another faction of brigands, not emulating the dignity of a "foreign prince or state, or . . . colony, district or people," or any designated class entitled to the protection extended by Congress to recognized foreign nations or governments "at peace" with the United States.

The exceptions therefore raise both the questions of political recognition of the foreign party or authority employing the expedition, as well as the intention of Congress in amending the statute by adding to the section as it originally read, in both branches, the words "or of any colony, district or people."

For an intelligent comprehension of the effect of the amendment, a brief review of the pertinent cases construing the act before and since the amendment may be useful. Many of the cases cited, compared, and discussed by counsel in their exhaustive arguments (*The Carondelet* [D. C.] 37 Fed. 801; *The Conserva* [D. C.] 38 Fed. 431; *The Florida*, 4 Ben. 452, Fed.

Cas. No. 4,887; *The Itata*, 56 Fed. 505, 5 C. C. A. 608) were cases adjudged before the comprehensive decision of *The Three Friends*, 166 U. S. 54, 17 Sup. Ct. 495, 41 L. Ed. 897, and are interesting more in that they emphasize the marked reluctance of courts to depart from established precedent than to illuminate the subject under discussion.

The inferior federal courts, having occasion to construe the law with the amendment, have followed with unrelenting tenacity *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381, which, according to the history of the particular legislation, rendered necessary the present enlarged provision of the act to meet situations wherein the previous or original act because of its restricted scope was deficient. *Gelston v. Hoyt*, *supra*, was an action of trespass against the collector and surveyor of the port of New York for seizing an American ship under orders of the President, dated July 10, 1810, for a violation of the act of 1794, § 3 (1 Stat. 383, c. 50), which provided for cases in which the vessel was fitted out and armed—

“with the intent to be employed ‘in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state, with whom the United States are at peace.’ ”

The defendants in the case pleaded that the seizure was justified under the statute, and that they were not responsible for the spoliation of the cargo and the damages suffered by the ship. Construing this statute, the court said (page 323 of 3 Wheat., 4 L. Ed. 381, *supra*):

“But the other point which has been stated . . . involves the construction of the act of 1794 (chapter 50, § 3). . . . No evidence was offered to prove that either of these governments was recognized by the government of the United States, or of France, ‘as a foreign prince or state’; and, if the court was bound to admit the evidence, as it stood, without this additional proof, it must have been upon the ground that it was bound to take judicial notice of the relations of the country with foreign states, and to decide affirmatively that *Petion* and *Christophe* were foreign princes within the purview of the statute. No doctrine is better established than that it belongs exclusively to governments to recognize new states, in the revolutions which occur in the world; and until such recognition, either by our own government or the government to which the

new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered."

Recognizing the effect of this decision, Congress in amending the act sought to extend its scope and include other broadly defined persons, groups, or classes in the service of whom hostile expeditions might be employed other than princes or states, as well as against whom hostilities might be committed.

The Supreme Court in the case of *The Three Friends*, *supra*, had under review sharply the point whether the act of fitting out an expedition "to be employed in the service of any foreign prince or state, or of any colony, district or people" was meant, as held by the lower court, to refer to a "body politic" which had been recognized by our government at least as "a belligerent."

The Supreme Court, in considering the application of the first branch of the section which designates in whose service the expedition was to be employed, broadly held that the word "people," taken in connection with the words "colony" and "district," covered any insurgent or insurrectionary body of people acting together, undertaking, and conducting hostilities, although its belligerency had not been recognized, and in reversing the lower district court said:

"Of course, a political community whose independence has been recognized is a 'state' under the act; and, if a body embarked in a revolutionary political movement, whose independence has not been recognized, but whose belligerency has been recognized, is also embraced by that term, then the words 'colony, district or people,' instead of being limited to a political community which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country, in the effort to achieve independence, although recognition of belligerency has not been accorded."

The remaining question for decision is whether or not Congress, by the addition of the phrase "or of any colony, district or people" to the words "any foreign prince or state" in the second branch of the section, sought to provide protection for an unrecognized foreign faction laying claims to sovereignty. By reference to standard dictionaries, as well as authorities on international law, it will be found very well settled that a "state or nation" denotes a political community organized under a

distinct government recognized and conformed to by its citizens and subjects as the supreme power. A "prince," in the general acceptation of the term according to authorities when applied in the law of nations, signifies a sovereign, a king, emperor, or ruler; one to whom power is delegated or vested. Necessarily, when the statute of 1794 described the contending factions, parties, or belligerents as "any foreign prince or state . . . against . . . another foreign prince or state," it described a sovereign or a political community entitled to admission into the family of nations; and, as such, political recognition was essential to the operation of the statute as it read. It did not then describe or cover in either branch of the section an insurrectionary body or an unrecognized force of belligerents contending for the sovereignty of any given territory. By the adjudged cases, chiefly *Gelston v. Hoyt*, *supra*, this defect in the act was disclosed to Congress and culminated in the re-enactment of April 20, 1818, now under consideration. In *The Three Friends*, *supra*, page 56 of 166 U. S., page 499 of 17 Sup. Ct. [41 L. Ed. 897], alluding to the amendments in the first branch of the section, the court say:

"At all events, Congress imposed no limitations on the words 'colony, district or people,' by requiring political recognition."

Further on in its opinion the court referred to the case of *The Salvador*, L. R. 3 P. C. 218, and regarded the observations therein as "entirely apposite," and, as before noted, held that the amendment covered any "insurgent or insurrectionary body of people . . . undertaking and conducting hostilities." In passing, the court called attention to the use of the same words, "colony, district or people," in the succeeding part of the section, and stated that as thus used they were employed in another connection, and "were affected by obviously different considerations." While this was a direct reference to the "succeeding part of the section," in the light of the opinion it cannot be held to possess the dignity of a construction, for the question as to its scope was not before the court, not necessary to the decision, and hence could not have been authoritatively decided there. In the view of this court such statement is in no wise controlling in the case at bar, for it clearly falls within the rule laid down by Chief Justice Marshall in the case of *Brooks v. Marbury*, 24 U. S. (11 Wheat.) 78, 6 L. Ed. 423, viz.:

"General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.

If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." Cited among other cases is *Schaap v. United States*, 210 Fed. 856, 127 C. C. A. 415, text.

It may be true that for a political community to be entitled to political recognition under the law of nations, it should have the attributes of sovereignty. In that event the provisions of the statute "any foreign prince or state" would necessarily embrace such a community. If recognition followed, that recognition would take place in the orderly way prescribed by rules governing such matters in national intercourse. There would be the necessary representative, the formal demand, and the formal action of the political department of the recognizing power.

Interpreting one section of the Neutrality Act after the amendments of 1818, the Supreme Court, in the case of *Wiborg v. United States*, 163 U. S. 647, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289, text, observed:

"It [the Neutrality Act] was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency."

Congress undertook to preserve the neutrality of the United States, not only in wars between states and nations recognized, but also in insurrections and political revolts in foreign countries where such contests produce a situation in which both factions are striving for exclusive dominion. If the United States is to preserve neutrality toward other nations and peoples as Congress designed, its ports cannot be used as a base of operations for military expeditions or enterprises which may not only go in furtherance of or in assisting an insurrectionary force, but which in its very nature, in the absence of strife, might incite revolt. Manifestly, therefore, Congress, in the addition of the words "colony, district or people," to the second branch of this section sought to provide for a situation which, and to describe a body of persons whom, it was impracticable to recognize politically.

There is no apparent reason for restricting the interpretation of the amendment to the first branch of the section, as stated in *The Three Friends*, *supra*, and there certainly is nothing in the

opinion to warrant the view that the words "foreign prince or state, or of any colony, district or people," as used in the second branch of the section, against whose "subjects, citizens or property" hostilities were intended, should receive a more strict application. Indeed, such a construction would fail utterly to compass what President Madison moved Congress to do by his earnest appeal for "more efficient laws to prevent violations of the neutrality of the United States as a nation at peace," by permitting belligerent parties to arm and equip vessels within the waters of the United States for military purposes.

From what is said it follows that the construction placed on the first branch of the particular section of the Neutrality Act is equally applicable to the second branch of the section, and consequently political recognition of the objects of the hostilities is not required as a condition precedent to a violation of the act, and the exceptions numbered 6 and 7 will be overruled.

NOTE.—The much-quoted statement of Justice Story to the effect that "there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale" must be construed with reference to the facts with which he was dealing. The warship of his time was no such instrument of destruction as it now is, nor did many of them differ so radically in construction from a merchant ship as is now the case. Neither Justice Story nor any other judge of his day would have thought it consistent with neutrality for a military force of several thousand men to be organized and equipped in a neutral country; yet Washington's little army, which compelled the surrender of Cornwallis at Yorktown, was a much less formidable military instrument than is a modern dreadnaught. In *Ex parte Chavasse* (1865), 11 Jurist, n. s. 400, Lord Chancellor Westbury quoted the passage from Justice Story's opinion cited above, and continued:

I take this passage to be a very correct representation of the present state of the law of England also. For if a British shipbuilder builds a vessel of war in an English port, and arms and equips her for war, bona fide on his own account, as an article of merchandise, and not under or by virtue of any agreement, understanding or consent with a belligerent power, he may lawfully, if acting bona fide, send the ship so armed and equipped for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act.

It should be observed however that the sort of transaction described by the Lord Chancellor never arises in the shipbuilding business as it is now conducted. Whatever may have been the practice in the

time of Justice Story or of Lord Westbury, at the present day war-ships are never built as a mercantile venture in the hope that when offered for sale a purchaser will be found. They are always built to order and their construction is always intended for the benefit of an ascertained government. Just prior to the outbreak of war with Spain, the United States purchased from Brazil two war vessels in course of construction in British shipyards. Upon the declaration of war, the British Government notified the American Government that these vessels when completed would not be allowed to leave British waters until the restoration of peace. As further illustrating the attitude of neutral governments towards trade in vessels see *United States of America v. Pelly* (1899), 4 Com. Cases, 100, *ante*, 384.

The use of neutral territory for the building and equipping of war vessels was most fully discussed in connection with the Alabama controversy. This case, notable not only as establishing a new standard of neutral duties but also as the most important example of international arbitration, is discussed in Bonfils (Fauchille), secs 958, 1465; Bernard, *The Neutrality of Great Britain during the American Civil War*; Cobbett, *Cases and Opinions*, II, 320; Cushing, *The Treaty of Washington*; Foster, *A Century of American Diplomacy*; Moore, *Int. Arb.*, I, ch. xiv; Moore, *Digest*, VII, 1059. The Alabama case is of importance in the history of the development of the law of neutrality because of the Three Rules of the Treaty of Washington. The United States insisted that these Rules were a correct statement of existing law. Great Britain denied this, but expressed her willingness to have her conduct judged by them. The Rules were as follows:

A neutral Government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Malloy, *Treaties and Conventions*, I, 703.

Whether these Rules were law when formulated or not, they were substantially embodied in Article 8 of the Convention respecting the Rights and Duties of Neutral Powers in Naval War adopted at The Hague Conference of 1907.

For further discussion of the duty of a neutral State to prevent the hostile use of its territory see Curtis, "The Law of Hostile Military Expeditions as Applied by the United States," *Amer. Jour. Int. Law*, VIII, 1, 224; Cobbett, *Cases and Opinions*, II, 306.

Since the outbreak of the Great War of 1914 there has been much discussion, especially in America, of the duty of neutral states to prevent the export of contraband goods. This is one of the oldest questions in European diplomacy. Almost a thousand years ago the Byzantine Emperor protested to the Doge of Venice against the sale by Venetians of arms and ship timbers to the Saracens with whom he was at war, and threatened to burn any of their vessels engaged in such traffic. The Pope also denounced this unholy commerce with the infidels. But it was so profitable that neither the Emperor nor the Pope nor the Doge succeeded in suppressing it. Each belligerent had to protect itself against trade in contraband as best it could. England endeavored to meet the situation by admitting foreign merchants to trade in England only on condition that they would not sell to England's enemies. During the Crusades, which were wars of the adherents of one religion against the adherents of another religion rather than of state against state, the Papacy was able to enforce to a considerable extent its prohibition of contraband trade with the Saracens, but as soon as the wars with the infidels gave way to wars between Christian states themselves the basis of the Papal prohibition disappeared and contraband trade was resumed. The absence of any conception of neutral obligation, as such obligation is now understood, even permitted the enlistment of soldiers in the territory of neutral states. Since neutrals were thus ready to aid belligerents, the latter sought to protect themselves by interfering as much as possible with the trade carried on with their enemies. In course of time, by treaty and by general custom, such interference came to be restricted to trade in articles which could be used in the operations of war, and by 1600 the right of a belligerent to suppress trade in contraband was generally recognized. This appears from the writings of both Gentilis and Grotius. Both these men, but especially Grotius, felt that there was something immoral, or at least reprehensible, in contraband trade and that it ought to be prevented, but neither of them held that the suppression of such trade was the duty of a neutral state. In the last three centuries there have been a few instances in which neutral states have attempted to restrain their subjects from exporting contraband, but whether this was because of their conception of neutral duty or because of a desire to protect their own interests is not always clear. The present rule however was given definite form by the United States in Hamilton's Treasury Circular of August 4, 1793:

The purchasing within, and exporting from the United States, by way of merchandise, articles commonly called contraband, being generally warlike instruments and military stores, is free to all the parties at war, and is not to be interfered with.

Both England and France protested against the principle thus announced. In defending it the Secretary of State, Jefferson, stated what still remains the chief reason why neutral governments refuse to attempt to suppress trade in contraband: "It would be hard in principle and impossible in practice."

That a contract for the carriage of contraband goods is enforceable was held in *Northern Pacific Railway v. American Trading Co.* (1904), 195 U. S. 439, 465.

One of the best statements of the duty of a neutral state as to trade in contraband is Secretary Lansing's note of August 12, 1915, in reply to the protest of Austria-Hungary of June 29, 1915. Other discussions of particular value may be found in J. W. Garner, "Some True and False Conceptions Regarding the Duty of Neutrals in Respect to the Sale and Exportation of Arms and Munitions to Belligerents," *Proceedings of Amer. Soc. Int. Law*, 1916, 18; W. C. Morey, "The Sale of Munitions of War," *Am. Jour. Int. Law*, X, 467; C. N. Gregory, "Neutrality and the Sale of Arms," *Ib.* X, 543; Sir William Vernon Harcourt, *Letters of Historicus* (defending the right of British citizens to sell arms to the Confederate States); Pyke, *The Law of Contraband of War*, ch. vi; Garner, *Ib.*, ch. xxxv; Hyde, *Ib.*, 748; Moore, *Digest*, VII, 748.

As to the duty of a neutral state to prevent acts of war within its jurisdiction see *The General Armstrong*, Moore, *Int. Arb.* II, 1071. If a neutral is unable or unwilling to enforce its neutrality, a belligerent may be justified in resorting to self-help in order to avert serious injury. Japan appealed to this principle in defense of her conduct in attacking the Russian destroyer *Ryeshitelni* while lying in the neutral port of Chefoo, China. Whether the facts were such as to sustain the Japanese contention is undetermined. For opposing views see Hershey, *International Law and Diplomacy of the Russo-Japanese War*, 260, and Takahashi, 437.

As to whether citizens of neutral states may make loans in support of an insurrection against the government of a friendly state, see *De Wütz v. Hendricks* (1824), 9 Moore, C. P., 586, and *Thompson v. Barclay* (1828), 6 L. J. (O. S.) Ch. 93 and (1831), 9 L. J. (O. S.) Ch. 215; Garner, *Ib.*, 408; Cobbett, *Cases and Opinions*, II, 365; Hyde, *Ib.*, 755; Moore, *Digest*, VII, 976.

As to offenses under the British Foreign Enlistment Act, see *The Gauntlet* (1872), L. R. 4 P. C. 184; *The Salvador* (1870), L. R. 3 P. C. 218; *The International* (1871), L. R. 3 A. & E. 321; *Regina v. Sandoval* (1887), 56 L. T. 526; and *Regina v. Jameson* (1896), L. R. [1896] 2 Q. B. 425. For the construction of the American Neutrality Act, see *United States v. Quincy* (1832), 6 Peters, 445; *Wiborg v. United States* (1896), 163 U. S. 632; *United States v. Trumbull* (1891), 48 Fed. 99; S. C. (1893), 56 Fed. 505.

The law as to neutral duties has been largely codified by Convention V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, and Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War, both adopted at The Hague Conference of 1907. See Scott, *The Hague Conventions*

and *Declarations of 1899 and 1907*, 133, 209. How far these conventions are binding is in dispute.

On the whole subject of neutral duties see Hall, *The Rights and Duties of Neutrals*; Kleen, *Lois et Usages de la Neutralité*; Fenwick, *The Neutrality Laws of the United States*; Cobbett, *Cases and Opinions*, II, 302; Hyde, II, 692; Moore, *Digest*, VII, ch. xxviii. For discussions suggested by the circumstances peculiar to particular wars see for the Boer war, Campbell, *Neutral Rights and Obligations in the Anglo-Boer War*; for the Russo-Japanese War, Ariga, *La Guerre Russo-Japonaise au Point de Vue Continental*; Hershey, *International Law and Diplomacy of the Russo-Japanese War*; Lawrence, *War and Neutrality in the Far East*; Smith and Sibley, *International Law as Interpreted During the Russo-Japanese War*; Takahashi, *International Law as Applied to the Russo-Japanese War*; for the Great War, Alvarez, *La Grand Guerre et la Neutralité du Chili*; Garner, *International Law and the World War*; Mérignhac and Lémonon, *Le Droit des Gens et la Guerre de 1914-1918*; Naval War College, *International Law Documents*, 1916, 1917, 1918; Scott, *Survey of International Relations between the United States and Germany, August, 1914—April 6, 1917*.

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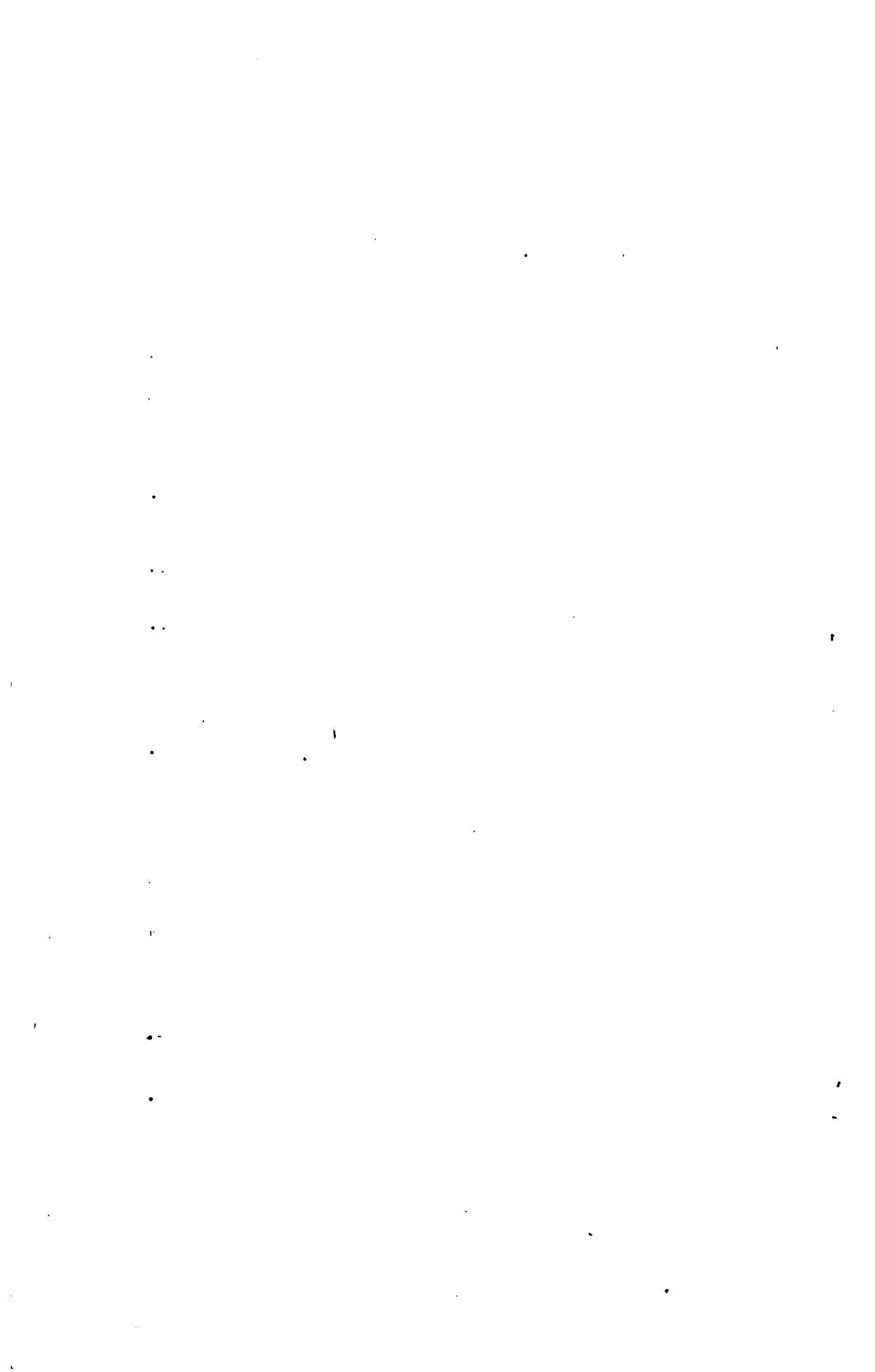
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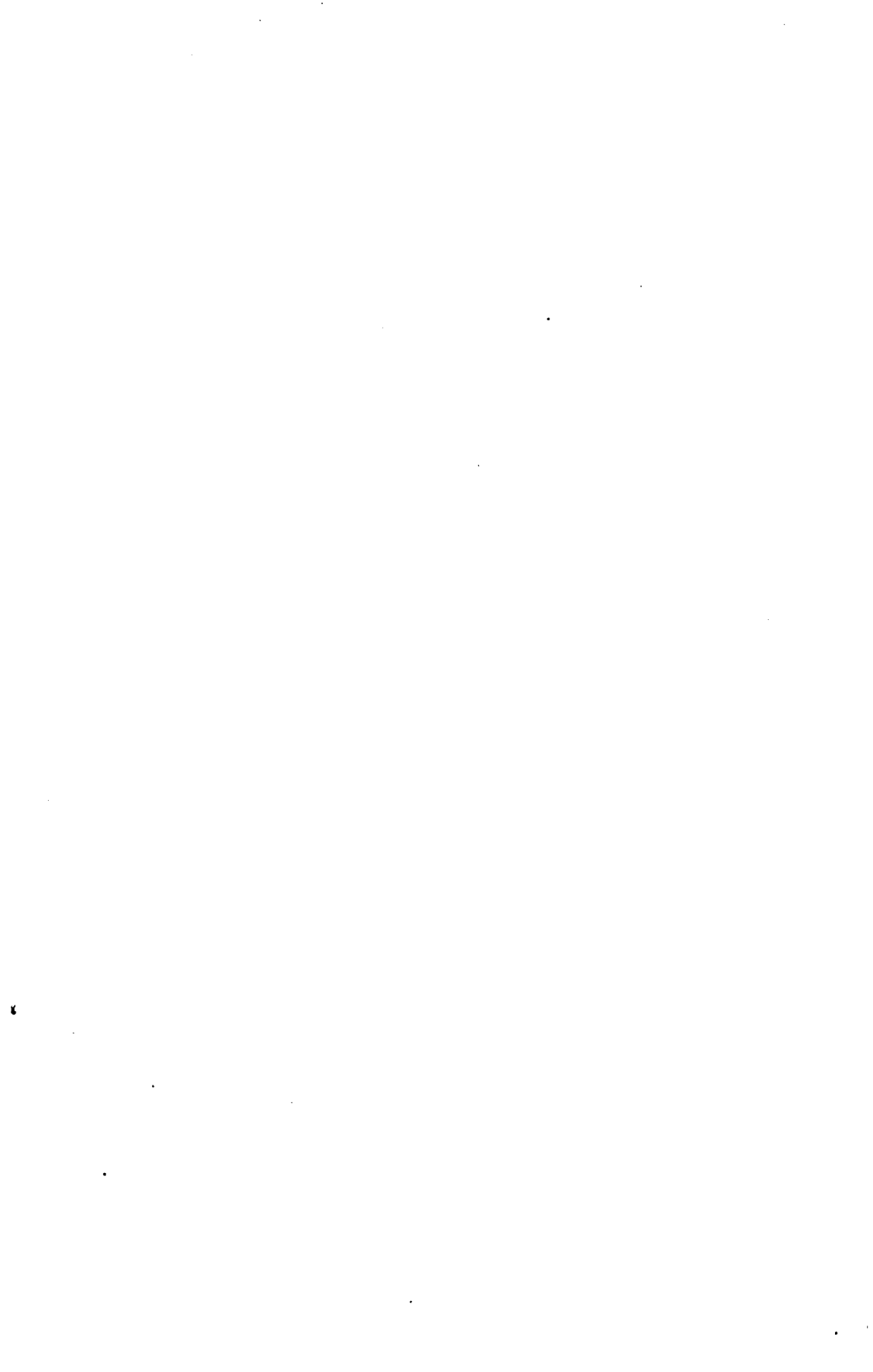
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